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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PAUL W. PETERSON,
Petitioner-Plaintiff-Appellant,

VS.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, TRANSPORTATION-COMMUNICATION EMPLOYEES UNION, SYSTEM DIVISION NO. 34 and TRANSPORTATION-COMMUNICATIONS DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Respondents-Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES B. WHAM
WHAM & WHAM
Attorneys at Law
212 East Broadway
P. O. Box 549
Centralia, Illinois 62801
(618) 532-5621
Attorneys for Petitioner-Plaintiff-Appellant, Paul W. Peterson

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

Petitioner Peterson was denied an award against his employer, defendant Railroad, by the National Railroad Adjustment Board, Third Division, under the Railway Labor Act (45 U.S.C. Section 152, 153) on his claims that Railroad violated the Collective Bargaining Agreement by wrongfully disqualifying him from his first shift telegrapher's position and then by wrongfully discharging him from employment with the Railroad.

Defendant Union twice refused to represent Peterson before the Board, although each time requested to do so, and through its acts and omissions, aided Railroad in obtaining its favorable awards from the Board.

Peterson, in the District Court action, demanded trial by jury against both defendants for damages growing out of the Union's breach of its duty of fair representation to him, which seriously tainted and undermined the arbitral process, thus removing the bar of finality of the award, and permitting recovery of damages against Railroad in the District Court for its wrongful acts.

Summary Judgment was granted by the District Court for both defendants and affirmed on appeal by the United States Court of Appeals for the Seventh Circuit.

The questions presented are:

I.

A. Was there a material issue of fact as to whether Union breached its duty of fair representation to Peterson, thus undermining the integrity of the arbitral process, tainting the Board's decision and removing the bar of finality of the Board's award against Peterson, thus permitting trial by jury for damages against both defendants in the District Court?

B. By the guarantee of the Seventh Amendment to the Constitution of the United States and within the meaning of Rule 56, Fed.R.Civ.Proc., should not the jury rather than the judge draw the inferences from the facts to determine the Union's motive in refusing to represent Peterson before the Board and in aiding Railroad to obtain an award against Peterson?

C. Would it not be a violation of the due process clause of the Fifth Amendment for the Board's railroad members to have automatically voted against Peterson as a matter of practice so as to deadlock the Board, thus permitting the case to be decided by a referee?

D. If, on the other hand, the vote of the Board was not that of an automatic deadlocking procedure, would not the unanimous vote of the Board's union members constitute evidence from which a jury could draw a reasonable inference that Peterson was prejudiced by the Union's bad faith refusal to appear for him before the Board, thus signaling to the Railroad members of the Board that Union did not believe in Peterson or his claims?

E. Assuming Peterson is entitled to a jury trial against Union for breach of its duty of fair representation, should not the jury rather thatn the judge also be permitted to draw inferences from the facts in determining whether Railroad wrongfully disqualified and discharged Peterson and to weigh the facts without considering the Board's denial of Peterson's claims against Railroad?

II.

In determining whether Union breached its duty of fair representation to Peterson, is the rigid standard of intentional misconduct adopted by the United States Court of Appeals for the Seventh Circuit in *Graf*[1] which the Court followed in the instant case rather than the less stringent standard previously followed by the Seventh Circuit in *Baldini*[2] and other circuits to be the standard contemplated by this Court in *Vaca*[3] and *Hines*[4].

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[1] *Graf* v. *Elgin, Joliet & Eastern Railway Co., and Brotherhood of Railway Carmen, Local No. 882,* Case No. 82-1864, Seventh Circuit Court of Appeals (decided January 7, 1983, unpublished copy Appendix F at page A-58.

[2] *Baldini* v. *Local Union No. 1095, Intern. U., etc.,* 581 F.2d 145, 151 (7th Cir. 1978).

[3] *Vaca* v. *Sipes,* 386 U.S. 171.

[4] *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 7 L.Ed.2d 231.

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Respondents-Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Paul W. Peterson, respectfully prays that a writ of certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Seventh Circuit.

An appeal to the Seventh Circuit was taken from the final Order of the United States District Court for the Southern District of Illinois rendering summary judgment in favor of the defendants, Chicago and Eastern Illinois Railroad Company (the "Railroad"), now merged with the Missouri Pacific Railroad Company, and the Union, now renamed and merged with the defendant, Brotherhood of Railway, Airline and

Steamship Clerks, Freight Handlers, Express and Station Employees (the "Union"), in a suit wherein the plaintiff-petitioner Peterson sought money damages, reimbursement of lost wages and reinstatement of his position against his employer, the defendant-respondent Railroad, and money damages against the defendant-respondent Union. Peterson's suit against Union is for breach of its duty of fair representation to him, thus tainting and removing the bar of finality of the National Railroad Adjustment Board Award rendered in favor of Railroad. In view of Union's breach of its duty to Peterson removing said bar, the suit against Railroad is for breach of the governing Collective Bargaining Agreement in wrongfully removing and disqualifying Peterson from his first shift position as telegrapher and wrongfully dismissing him as an employee of the Railroad.

The Seventh Circuit, in affirming the District Court, ruled that Petitioner Peterson failed to show that there are any material facts which might be resolved by a jury at trial establishing that Union breached its duty of fair representation to its member, Peterson, thus preventing recovery against both defendants as a matter of law.

OPINIONS BELOW

The Judgment and Order of the United States Court of Appeals for the Seventh Circuit filed May 10, 1983, affirming the final judgment of the District Court of the United States for the Southern District of Illinois, appears as Appendix A hereto. The Judgment and Order is unpublished. Petition for Rehearing, timely filed on May 24, 1983, by petitioner-plaintiff-appellant, Paul W. Peterson, was denied on July 21, 1983, which Petition for Rehearing appears as Appendix B hereto, and the Court's Order denying Petition for Rehearing appears as Appendix C hereto. The Order of the United States District Court for the Southern District of Illinois granting Summary Judgment for defendants, which was affirmed on May 10, 1983, appears as Appendix D hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered May 10, 1983, rehearing was denied on July 21, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and 45 U.S.C.A. Sec. 153 First (i) and (m) and (q), and 28 U.S.C.A. 1337. Also, the standard applied by the United States Court of Appeals for the Seventh Circuit in this case conflicts with the standard applied by other Circuits in determining whether Union has breached its duty of fair representation, which conflict should be resolved by this Court so that a uniform standard will be applied in all Circuits. Rule 17(1) (a), Supreme Court Rules, Title 28 U.S.C.A.

STATUTES INVOLVED

The statutes and constitutional provisions involved are set forth in Appendix K attached hereto.

STATEMENT OF THE CASE

Petitioner-plaintiff-appellant, Paul W. Peterson, was employed as a telegrapher by the defendant, Chicago and Eastern Illinois Railroad Company (the "Railroad"), now merged with the Missouri Pacific Railroad Company, at the Wansford Yard near Evansville, Indiana from 1946 to 1965. On December 23, 1964, Railroad suddenly and without notice, removed and disqualified Peterson from his first shift operator position. Railroad contended he had delayed transmission of consist reports to the Chicago Office, which contention was disputed by Peterson. A hearing was held on January 11, 1964, at which Peterson was represented by his Union, now renamed and merged with the defendant, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (the "Union").

At this hearing, General Chairman Hayes, Union representative appearing for Peterson, strongly supported Peterson as follows:

"Peterson was suspended from work on December 23rd, two days before the Christmas Holidays, without any warning or reason, presumably account the Piggyback consist was not transmitted promptly that day. Yet, as Peterson informed Mr. Cable, he could not send it until the Lineman completed repairs to the equipment. So, he was suspended from his position and declared unqualified even though he was not at fault.

"Mr. Peterson has been an employee of this railroad for nearly twenty years. Needless, to say, Peterson was shocked by the notice that he was disqualified, knowing that he hadn't done anything to merit it. It was at his representative's suggestion that he went to Chicago Heights on January 5th, to ascertain what the trouble was and to try and see if it couldn't be disposed of. However, as a condition of his return to his assignment, he was presented with an affidavit to sign that not only would have admitted he was guilty of some wrong-doing, but would have permanently disqualified him for any reason, even one over which he had no control. He did not sign the affidavit as any reasonable intelligent person would refuse to do.

"Therefore, by the carrier's action in suspending him from work two days before Christmas for something over which he had no control, and without endeavoring to ascertain why the consist was not sent promptly on December 22, and by not permitting him to resume work after being apprised of the facts without his signing a binding affidavit, we can only conclude that without question, there is prejudice against him.

"It is, therefore, the position of the Employees that the carrier is not only in violation of the discipline rule when it suspended him without a hearing under the disguise of disqualification, but violated the suspension from work rule; the Guarantee rule; the seniority rule, as well as related

rules, and is liable for wages lost and penalties for each day that he is held off his rightfully owned assignment." (A 141, 142) (Amended Supplemental Petition Exhibit "M", A 44)." (Appendix E, pages A-44 - A-45)

His disqualification was nevertheless affirmed by the Railroad and again affirmed on appeal to higher officers of the Railroad.

After being disqualified from his position as first shift operator, he was subsequently discharged by the Railroad which was likewise affirmed on appeal to higher officers of the Railroad.

Peterson requested that Union appeal Railroad's decisions on these grievances to the National Railroad Adjustment Board under the provisions of the Railway Labor Act. The Union kept under advisement Peterson's request until after the deadline for the appeal on the disqualification claim, November 15, 1965, had passed.

After the deadline had expired, the Union President, G. E. Leighty, on January 26, 1966, wrote a letter to General Chairman Hayes, who represented Peterson on his grievances, and instructed him that the Union would not take the appeal (Appendix G). On January 28, 1966, Hayes informed Peterson of Union's decision. This was Peterson's first notice that Union had decided to abandon his case.

Peterson then attempted to take the appeal himself. The disqualification grievance was denied by the Board on the ground that the appeal was not timely filed, and the dismissal grievance was also denied (Appendix D).

Dissatisfied with the result, Peterson filed for judicial review of the Board's decisions in the United States District Court on July 11, 1968, and thereafter filed his Amended Petition in the same action seeking relief against Union for breach of the duty

of fair representation and against Railroad for damages resulting from the wrongful disqualification and discharge (Appendix D). Peterson demanded trial by jury on those counts. The jurisdiction of the District Court was invoked under 45 U.S.C.A. Sec. 153 First (i) and (m) and (q), and 28 U.S.C.A. Sec. 1331 (a) and 1337. *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 199, 204, 65 S.Ct. 226, 89 L.Ed. 173 (1944); *Glover* v. *St. Louis-San Francisco R. Co.*, 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519, 523, 524, and also, *Graf* v. *Elgin, Joliet & Eastern Railway Co., and Brotherhood of Railway Carmen, Local No. 882,* Case No. 82-1864, Seventh Circuit Court of Appeals (decided Jan. 7, 1983, unpublished copy Appendix F), cited in the Circuit Court of Appeals Order in this case, support jurisdiction of the District Court.

The District Court, at Union's request, realigned Union as party plaintiff with Peterson on the review of the Board's Award and on May 4, 1976, ordered the case remanded to the Board for a hearing on both claims. The Court also, at Union's request, stayed proceedings on the fair representation claim against Union and on the common law counts against the Railroad pending the determination of the Board's action on Peterson's grievances against Railroad (Appendix D). Again, Peterson requested Union to appear on his behalf before the Board, and Union again refused to do so.

On January 11, 1980, after many depositions had been taken during which Union sided with Railroad against Peterson on Peterson's claims against Railroad (Appendix E, pages A-55 - A-57), the Board denied both the disqualification and dismissal grievances. Peterson again appealed to the District Court and was permitted to file additional counts against Union for breach of its duty of fair representation prior to and during the Board proceedings, which included charges that Union assisted Railroad in examination of witnesses in depositions "in an adversary manner against petitioner;" in refusing to appear for and represent petitioner in the proceedings before the National

Railroad Adjustment Board (the "Board") on remand; in taking positions "contrary to the best interest of petitioner" with respect to interpretation of the collective bargaining agreement; and in withholding support and representation from petitioner, "knowing that such withholding would have an adverse effect on petitioner's cause," before the Board. (Appendix D)

On March 10, 1982, the District Court granted the Summary Judgment motions filed by Railroad and Union on all Counts (Appendix D). Peterson filed a Motion for New Trial contending that the judgment so rendered erroneously deprived him of his right to trial by jury against both Railroad and Union. The District Court denied the Motion for New Trial on May 12, 1982.

Peterson appealed the District Court's Summary Judgment Order to the United States Circuit Court of Appeals, Seventh Circuit. On May 10, 1983, the Seventh Circuit entered an Order affirming the District Court, and on July 21, 1983, denied Peterson's timely filed Petition for Rehearing (Appendix A, Appendix B, Appendix C).

The facts relied on by Peterson supporting his right to trial by jury against Railroad and Union in the Seventh Circuit Court of Appeals are set forth in Appendix E, inasmuch as no analysis of the evidence, taken in the light most favorable to Peterson, appears in the Court's Order, thus necessitating the reciting of those facts in the appendix due to their length.

REASONS FOR GRANTING WRIT

I.

Peterson Has Been Erroneously Deprived Of His 7th Amendment Right To A Trial By Jury And In Violation Of Fed.R.Civ.Proc. 56

Forty years ago, Mr. Justice Black called attention to the "gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway* v. *United States*, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458, 1474 (1943) (dissenting opinion).

Forty years later, the erosive process continues. It is apparent from the Order entered by the United States Court of Appeals for the Seventh Circuit in this case that the Court erred in making highly significant factual conclusions that should have been left for jury determination (Appendix A, pages A-2 - A-4).

Unless rules preventing such factual determination by judges in summary judgment proceedings are followed and enforced, the Seventh Amendment will one day stand only as a curiosity piece—not a guaranteed right but as a watered down right available only by way of judicial discretion.

Especially is this so in cases involving motive, intent and bad faith acts and omissions of advocates, including unions charged with representing people whose rights are at stake. This union member, Peterson, was entitled to a good faith representation by his union and the jury, not the judges, should determine the motive of Union in its refusal to represent him.

Here, the significant facts establish that Peterson, a union member, had a serious grievance with his Railroad employer that involved his right to a position he fulfilled for a number of years. In labor parlance, he owned the job as long as he could

properly perform it. Who is to be the arbiter of his performance and Railroad's actions? Certainly not Union or Railroad. The National Railroad Adjustment Board is supposed to be the arbiter *unless* Peterson's Union breached its duty of fair representation, tainting the Board's decision, thus removing its bar of finality. In such case, the jury becomes the arbiter of Peterson's performance and Railroad's actions. *Vaca* v. *Sipes*, 386 U.S. 171, 187, 17 L.Ed.2d 842 (1966); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 566, 47 L.Ed.2d 231 (1976).

Who is to determine whether the Union breached its duty? Certainly not the Union, Railroad or Board. Shall it be the judge or the jury?

The Seventh Amendment requires the District Court, the Court of Appeals, and this Court to afford Peterson the right to a trial by jury on this issue unless, under a proper determination, it can be said that no genuine issue remains for trial. As stated in *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458, 461, speaking of Rule 56(c), Fed.R.Civ.Proc."

> " '...the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' "

Here, there really is an issue to try. It involves the motive of the Union in its actions and nonactions toward Peterson. No Judge should make a determination of Union's motives when a jury trial has been demanded. As stated in *Poller* at page 464:

> "...We believe that summary procedures should be used sparingly in complex antitrust litigation where motives and intent play leading roles,..."

This is no less true in a case wherein a Union is charged with the breach of its duty to fairly represent a union member. Motive and intent play leading roles in determining whether Union

acted in good faith or bad faith in twice refusing to represent Peterson before the Board and in its actions and maneuvers designed to assist Railroad to bring about Peterson's defeat before the Board, thus hopefully rendering moot the Union's neglect in permitting the 9 month appeal limitation to run.

As stated by the Seventh Circuit in *Baldini* v. *Local Union No. 1095, Intern. U., etc.*, 581 F.2d 145 (7th Cir. 1978) at page 151:

> "...Where a choice of inferences is possible from summary judgment materials, the inference must be drawn that favors the party resisting summary judgment.... We note also in this regard the sound axiom that questions of motive, design and intent are particularly inappropriate for summary adjudication...."

The Seventh Circuit in the instant case neglected to follow its own decision. Rather than according Peterson his Seventh Amendment right to have the jury draw the inferences as to Union's motives, the Seventh Circuit erroneously decided, as a matter of law, that the Union "clearly had the right to decide not to pursue Peterson's grievance *when it decided in good faith that the grievance was not a meritorious one....*" (Order, Appendix A, page A-5). (emphasis ours)

The facts presented to the Circuit Court of Appeals set forth in Appendix E, pages A-40 - A-57, establish a factual basis from which reasonable inferences could be drawn by a jury that the Union's decision to not appeal Peterson's case was a bad faith determination. The Seventh Circuit's conclusion that Union's motives were good does not sweep away the counter-indicators that conflict with that conclusion.

The jury could draw reasonable inferences from the chronology of Union's activities and comparison of Union's positions at different stages of this saga in determining the real reason why Union discarded Peterson and withdrew its representation at the most crucial time of his claim against Railroad.

From the facts, the jury could reasonably conclude that the final decision of Union not to appeal to the Board was dictated by Union's motive of a self-interest cover-up rather than by a good faith appraisal of the merits of Peterson's claim against Railroad. When the Union's President Leighty, by his letter of January 26, 1966 to General Chairman Hayes (Appendix G, Exh. J-44), directed him to withdraw from further representation of Peterson, the nine months time limitation for appeal to the Board on the disqualification claim had long since expired. The November 16, 1965 deadline for filing the appeal could therefore not be complied with by Peterson when he attempted in vain to process his own appeal after being informed that his Union would not do so. The Union knew this rule and knew it had negligently permitted the time to elapse under the rule then applicable.

Peterson had been informed by Hayes at the conclusion of the disqualification hearing that he had a fifty-fifty case on appeal (Appendix E, page A-50).

On September 7, 1965, he wrote to Leighty advising that he wanted his case appealed and that there were many facts he needed to give him at a personal conference. On September 10, 1965, Leighty replied that, "...The decision to progress your case to the Third Division will be made by this office, based upon the facts and circumstances involved in the matter itself." (Appendix E, page A-53). On October 12, 1965, Peterson went to the Union office in St. Louis, Missouri to see Leighty, who was not available, and talked to Dysert, a Union Official at the Union office, and left an account of the facts in Leighty's office with Dysert. He again informed Dysert at that time that he wanted his case appealed and requested to be informed whether Union was with him or not. He heard nothing until January 28, 1966, when informed by Hayes at Leighty's instructions that the Union would no longer represent him, which message came long after the Union had negligently permitted the time limit for an appeal to expire on the disqualification claim (Appendix E, page A-54).

From these facts, the jury could draw the reasonable inference that the Union made no good faith effort to plead plaintiff's case and had arbitrarily and capriciously and in bad faith refused to represent him before the Board after lulling him into the belief that Union would appeal or notify him in time so that he could do so himself.

It was in this context that the Union President Leighty rewrote the facts in a self-serving effort to bolster and lend credence to the Union's reasoning for not proceeding further. It indicates that the Union decision was colored by the self-interest of the Union to avoid going forward with the case when Union knew that it had negligently allowed the time limit to expire and knew it would have been subject to public rejection by the Board had the Union carried the matter forward. The hope of the Union was that Peterson would not appeal. Union thought he would quit—but he didn't. The Court erred in ignoring this reasonable inference which the jury could have drawn from the evidence.

The betrayal of Peterson by Union clearly appears from Union's switch from initial support of Peterson to its ultimate opposition against him. Such fast footwork of the Union is not for the Court to ignore but for the jury to consider.

One example of the many switches in Union's position appears in the comparison of the statements of General Chairman Hayes and Union President Leighty as to Peterson's refusal to sign the ultimatum prepared by the Railroad January 4, 1965, prior to the disqualification hearing of January 11, 1965, as a condition for its restoration of Peterson to his first shift position of employment.

Hayes, at the time of the hearing and before the appeal time had been permitted by Union to expire, stated on behalf of Peterson that any reasonably intelligent person would refuse to sign the agreement since by signing, he would have "admitted he was guilty of some wrongdoing" that would have "permant-

ly disqualified him for any reason, even one over which he had no control." (Statement of the Case page 4). Again, on Hayes' appeal of March 3, 1965 to the Railroad Official Lyons, Hayes supported Peterson in his refusal to sign such an agreement in even the modified form since "it would have committed him to admitting guilt of some wrongdoing which he emphatically denies, and we maintain that there was no evidence submitted to prove him guilty of any offense." (Appendix E, page A-52).

Leighty, on the other hand, in his letter of January 26, 1966 to Hayes instructing him to cease representation of Peterson, made a false statement concerning the proposed agreement, claiming that, "Carrier agreed to withdraw this condition from their offer, leaving only the condition that Peterson cooperate with the Carrier" (Exhibit J-44, Appendix G).

The jury could reasonably conclude that Leighty, in his haste to wash the Union's hands of Peterson, made a bad faith appraisal of Peterson's claim by completely ignoring the facts of the wrongful disqualification and the Union's position taken by General Chairman Hayes at the January 11, 1965 hearing, and through all appeals on the Railroad premises before Railroad officials.

At that stage, long before Union had negligently permitted the time limitation to expire, Hayes strongly supported Peterson, stating that Peterson "was suspended from his position and declared unqualified even though he was not at fault" and that "we can only conclude that without question, there is prejudice against him." and "therefore,...Carrier is not only in violation of the discipline rule when it suspended him without a hearing under the disguise of disqualification, but violated the suspension from work rule; the Guarantee rule; the seniority rule, as well as related rules, and is liable for wages lost and penalties for each day that he is held off his rightfully owned assignment." (Statement of the case pages 4, 5, Appendix E, page A-45).

Likewise, the jury could draw the inference that Leighty made a bad faith appraisal of the Peterson grievance for wrongful discharge. Leighty ignored the Union's position stated by Hayes on appeal of the dismissal charge to the Railroad Officials in his letter of August 7, 1965 that "Peterson's dismissal for 'failure to report for work', is not only unreasonable and harsh, but all out of proportion..." and "that he himself can determine his fitness for work, and the fact that during his twenty years of service he was never disciplined for the same cause, is evidence of his willingness to work when he is well.' ", and advising that this was a bona fide claim and that the Union "cannot accept your declination of this claim,..." (Hayes' letters to Railroad of August 7, 1965 (Exhibit J-39, Appendix H), August 18, 1965 (Appendix I), and October 26, 1965 (Exhibit J-42, Appendix J)).

Another self-serving position not dictated by a good faith appraisal of the merits was Leighty's argument that Peterson refused to assume his obligation as an extra employee (Exhibit J-44, Appendix G). There was not such obligation. Neither Union nor Railroad could point to any provision of the Collective Bargaining Agreement that required Peterson to sign up on the Extra Board while his wrongful disqualification claim was being appealed.

Therefore, Leighty in his letter of January 26, 1966, misrepresented the facts to suit the Union's purposes when he stated, "For reasons known only to Brother Peterson, he has refused to return to work on his regular assignment and has also refused to assume his obligation as an extra employee." (Appendix G). Peterson had no regular assignment. He had been wrongfully banned from performing his duties by the Railroad and had been given no order to perform any other job.

Moreover, D. E. Lyons, the Assistant Director of Personnel for the Railroad, admitted that there was no rule that required a man of higher seniority to bid in a job over a man of less seniori-

ty, and admitted that he knew of no telegrapher's job open to Peterson prior to his discharge in April, 1965 (Appendix E, page A-47).

It is in such context that Union's actions in thereafter slanting everything against Peterson must be considered in its attempt to cover and protect itself by adopting positions contrary to the interest of Peterson, whereas prior to the expiration of the time limit, General Chairman Hayes had stated the Union position strongly in favor of Peterson (Statement of the case pages 4 and 5, Appendix E, pages A-44 - A-45).

The Union President Leighty's self-serving contention that Peterson's claim lacked merit, contrary to the previous statement of General Chairman Hayes favoring Peterson, is relied on by Union as the reason for not appealing to the Board (Appendix G, Appendix E, page A-54, Appendix D, page A-23). This contention presents the key issue of the case which should be determined by the jury, not the judges.

Union's situation is no different than that of a lawyer who originally stated a strong belief that his client's cause was meritorious, but upon negligently allowing the Statute of Limitations to run, conceals such fact from the client and turns the case back with a lecture to the client that the case totally lacked merit.

If the lawyer claimed that such a switch of opinion represented his good faith appraisal of the client's cause after negligently allowing the Statute to run, he would be laughed out of court.

If the real reason behind the Union's evaluation of Peterson's claim against Railroad in refusing to take the appeal for him was to bury the case so that its mistake in permitting the limitation period to run would not be discovered, then the jury could reasonably infer that the Union was not only negligent but also was guilty of extreme bad faith in its failure and refusal to fairly represent Peterson.

Such bad faith would then set the stage rendering suspect and tainting all subsequent actions and non-actions of Union regarding Peterson and his claim against Railroad. The Seventh Circuit clearly missed this point.

The Order states: "...this failure amounts at most to negligence on the part of the Union, which does not suffice to support a breach of the duty of fair representation in this circuit. *Graf* v. *Elgin, Joliet & Eastern Railway*, No. 82-1864, slip op. at 11 (7th Cir. Jan. 7, 1983)...." (Appendix A, page A-5).

The Court then disposed of whatever Union error it found by an erroneous rationale demonstrating the Court's misconception of its prerogative in the fact finding field. It drew inferences from facts that should have been left for jury deliberation when it concluded as follows:

> "...Moreover, Peterson's disqualification grievance although it was initially dismissed by the Board as untimely, was ultimately remanded by the district court for rehearing; the Board then considered it upon the merits and denied it. Thus the mistaken information which the Union conveyed to Peterson about the period for an appeal cannot be said in any way to have tainted the arbitral process." (Appendix A, pages A-5 - A-6)

In coming to this conclusion, the Court erroneously judged Union's motives rather than leaving such judgment to the jury. The Court ignored the obvious effort of Union to bring about a Peterson defeat of his claims against Railroad for the self-interest of Union by the remarkable 180 degree switch from initial support of Peterson to blatant support of Railroad.

How can it be said as a matter of law that the arbitral process was not tainted under the facts and inferences favorable to Peterson in this case? The issue presents a classic jury question rather than an issue to be swept away by the Court in a flat statement that the arbitral process was not tainted.

In the District Court action, Union was confronted with potential liability for breach of its duty of fair representation to Peterson growing out of the failure to appeal his case in time. The facts before the Seventh Circuit (Appendix E, pages A-40 - A-57),establish the basis for a reasonable inference that Union embarked upon a bad faith effort to bring about the ultimate defeat of Peterson in his claims against Railroad with intent to render moot the case against Union.

First, the Union successfully persuaded the Court to realign Union as plaintiff along with Peterson in the review hearing on the Board's denial of Peterson's claim against Railroad. This resulted in the Court's order remanding both the disqualification and discharge claims to the Board for a de novo hearing on the merits (Appendix D).

Second, upon achieving that goal, the Union then succeeded in removing itself from the direct line of fire in the common law action of Peterson against Union by obtaining a stay of proceedings pending the Board's determination on the merits of Peterson's claim against Railroad (Appendix D).

Third, the Union then refused to join with Peterson before the Board against Railroad, although realigned as plaintiff with Peterson and requested by Peterson to do so (Appendix A, Appendix E, page A-55).

Fourth, Union then pursued an adversary course against Peterson and in favor of Railroad on the wrongful disqualification and discharge issues—a wholly improper switch in position from that which Union initially took while representing Peterson against Railroad in the grievance procedures on the Railroad premises (Appendix E, pages A-55 - A-57).

Fifth, no sooner had Board denied Peterson's claim in its second award of January 11, 1980, than Union, as predicted, took the position that Peterson's claim against it was moot. (Union Motion for Summary Judgment, Record Vol. III, Document

103, Conclusion pages 23 and 24), and argued to the District Court in support of its Motion for Summary Judgment that, "The proximate cause of his disqualification from the first shift telegrapher position was his failure to send certain reports to the Carrier's Chicago Office on December 22, 1965.", which represents a complete change from its position stated by M. J. Hayes, Union General Chairman, on the premises (Record Vol. III, Document 104) (A 141, 142, 158) (Appendix E, page A-57).

What was the Union's motive in all this manipulation? The jury could reasonably infer a bad faith motive designed to bring about Peterson's defeat before the Board on his claim against Railroad, for the purpose of insulating Union from liability for its initial neglect.

If this type of Union manipulation is to be rewarded, then the entire process governing grievance procedures is a cruel charade deserving nothing but scorn. Such Union conduct would never persuade a jury that Union had fulfilled its duties of fair representation.

After Union had, for its own self-interest, realigned itself as plaintiff with Peterson against Railroad and obtained a stay of proceedings of all claims against itself, the jury could conclude that Union, by its voluntary realignment, owed Peterson a duty to appear with him and represent him before the Board on remand so as not to prejudice him in the eyes of the Board.

After the Union's realignment, Peterson requested Union to appear with him before the Board. Notwithstanding the request, Union, however, again abandoned Peterson and refused to appear for him before the Board on the issue that did not then constitute a threat to the Union, but only to the Railroad, namely, the disqualification and dismissal of Peterson by Railroad, which Union had originally contended was wrongful. Had Union appeared for Peterson in a good faith effort to help him and not hurt him against Railroad, no detriment would have resulted to the Union.

Once the Union realigned itself and made the successful attempt to remand the case to the Board, it became duty-bound to assist Peterson against Railroad before the Board. Any refusal to do so after joining Peterson against Railroad would have the same prejudicial effect on the Board against Peterson as if Union had taken affirmative action designed to damage him.

This was not a conflict between Peterson and Union, but rather a conflict between Peterson and Railroad which Union should have continued to support before the Board as it had on the Railroad premises.

There is a principle well stated in *Kesner* v. *National Labor Relations Bd.*, 532 F.2d 1169 (1976 7th Cir.), at page 1175, that:

> "...It is venerable tort law that purporting to take action where duty is nonexistent creates in itself certain duties, or as the Board puts the matter, 'it is a common-place of our jurisprudence that those who act where they are not obliged to are nevertheless liable for misfeasence (sic) in the course of their undertaking.'..."

As stated in *Kesner* (page 1175):

> "...When one's own representative who has been willing to assume that status proclaims a lack of merit, it is indeed likely to be a coup de grace to the claim...."

Silence oft times speaks louder than words. Where one is expected to speak if he supports the man and then withholds comment, a reasonable inference can be drawn that he does not believe in the man or his cause. This was the message Union intended to signal the Board.

The jury could therefore conclude that the arbitral process was tainted by Union's arbitrary bad faith withholding of its weight, prestige and assistance from Peterson, while at the same time having realigned itself with him, thus indicating to the Board the Union's opposition to Peterson by its absence. It can-

not be said that such posture would be harmless to Peterson—nor can it be denied that harm was intended.

It is common sense that Peterson's position would have been enhanced by the presence of the Union on his side when his case was considered by the Board made up of Union and Railroad representatives. It is common sense that Peterson's case was damaged by Union's indicated opposition by an absence and silence which was the "coup de grace" to the claim. Therefore, when Union voluntarily realigned with Peterson, the jury could conclude that it had no right to then back off from him, knowing that such action would damage him.

Both the District Court and Court of Appeals misapprehended the inherent prejudice that resulted.

In erroneously rejecting Peterson's contention that he was prejudiced by Union's absence, the District Court misapprehended the issue as is reflected by its rationale that, "He was already represented by his present, very able counsel...." and that, "Second, the claims were ultimately referred to an impartial referee when the Board became deadlocked. It is apparent that the plaintiff had the backing of his union in the voting, and thereby obtained the further benefit of the referee." (Appendix D, page A-37).

The fact that Peterson had his own counsel is no answer to this problem. Daniel Webster himself could not fill the void created by Union's absence nor overcome the signal given to the Railroad Board members that the Union did not believe in Peterson or his cause.

On the second point, an obvious dilemma arises from the District Court's rationale which Union adopted in its brief filed in the Circuit Court of Appeals wherein it states:

> "Obviously, the Union supported him before the Board since without its vote the case would not have been deadlocked and sent to the neutral referee." (Union Brief, page 39)

One of two results must necessarily follow. As stated in Peterson's Petition for Rehearing in the Court of Appeals:

> "First, the inference arising from the vote of Union board members supports Peterson's contention that the case was worthy of appeal and that such fact should be considered by the jury, not the Court, in determining whether or not the Union made a bad faith determination not to appeal on behalf of Peterson. Secondly, in the event the acknowledgment of Union bespeaks the fact that in all cases there is an automatic deadlock between Railroad members of the Board and Union members of the Board, then Peterson did not receive a due process hearing inasmuch as the Railroad board members would automatically deadlock against Peterson. It necessarily follows in such event that the whole system of hearings under 45 U.S.C.A. Sec. 153 represents an indefensible charade operating under the guise of due process and that Peterson should therefore be entitled to a jury trial irrespective of the holding of the Board and irrespective of the position stated by Union and Railroad concerning the statutory law governing the Board since it is obvious that he has been denied a fair hearing and due process as contemplated by the Fifth and Fourteenth Amendments to the Constitution of the United States...." (Appendix B, pages A-18 - A-19).

Union cannot have it both ways. Either the votes of Board members were legitimate or they were the product of an arbitrary deadlocking procedure violating due process and the right to a fair hearing. Assuming that the Board's voting procedure was legitimate, the jury could also conclude that had Union not in bad faith withheld its support, at least one Railroad Board member would have joined the Union Board members, thus resulting in a favorable award for Peterson.

The Court of Appeals, in denying the Petition for Rehearing, gave no answer to this dilemma. Either way it is determined, the jury may draw inferences supporting Peterson's position.

There is yet another factor that the jury should have the right to consider. After Union had joined Peterson as a realigned plaintiff, numerous depositions were taken at the insistence of Union, the testimony of which was part of the record before the Board. Union's advocacy for Railroad and against Peterson on the issue of disqualification and dismissal is apparent from these depositions.

The jury could consider the contrast in Union's position with respect to R. O. Cable, who was the key witness for Railroad against Peterson. General Chairman Hayes took a strong position at the hearing on disqualification January 11, 1965, favorable to Peterson and contrary to Cable. Years later on September 28, 1977, Union's counsel, however, throughout the deposition of Cable, sought to bolster and support him as a believable witness (Cable deposition filed November 4, 1977) in the face of the obvious impeachment of Cable on his cross examination by counsel for Peterson. The jury could reasonably infer from this switch that the Board would consider Cable's testimony in a much more favorable light than if Union had maintained the critical position that General Chairman Hayes had taken against Cable at the January 11, 1965 hearing. This could not fail to prejudice Peterson's case before the Board, which prejudice, the jury could conclude, was the intent of Union.

Other instances of Union's assistance to Railroad and prejudicial conduct against Peterson is disclosed in Appendix E, pages A-55 - A-57).

During Peterson's cross examination of Burkhart at his deposition on October 11, 1977, counsel for Union attempted to prevent disclosure for use in cross examination of a discoverable written memorandum in the possession of Burkhart containing Burkhart's conversation with counsel for Union, Alan B. Hoffman, prior to his testifying on deposition (pages 219-291, Burkhart depo. filed Nov. 2, 1977). After the Memorandum was finally produced, the following questioning took place:

Q: And didn't you tell Mr. Hoffman at that time—and Mr. Hoffman is the attorney appearing on behalf of the Union—with regard to the Petitioner, "It was unheard of for someone to be taken off the job in this fashion?"

A: Let me see that. Yes, I used those words.

Q: That was with regard to the disqualification of Peterson?

A: Yes. (Burkhart deposition p. 228)

* * *

Q: Now, at the time of your conversation with Mr. Hoffman, did you tell him that after the disqualification hearing January 11, 1965, that "by this time Peterson did seem to be in bad shape physically."?

A: That was my opinion. (Burkhart Deposition P. 230)

Also, he admitted that on the second page of the memorandum, he stated to Mr. Hoffman that there were two telegraph wires to Chicago from Wansford, one was down about 10% of the time and the other was down about 40% of the time and that on occasion, there were outages for a few hours at a time (Burkhart deposition P. 228, 229). All of these facts were obviously favorable to Peterson on his claims against Railroad.

Why should Union, through its counsel, seek to hide the evidence from Peterson? The answer is clear. The Union, once again, actively sought to defeat Peterson's claim against the Railroad by making a 180 degree switch of position from that taken by Hayes in support of Peterson to one of balatant opposition.

Also, during the Union's questioning of D. E. Lyons, Assistant Personnel Director of Railroad, counsel for Union stated into the record with reference to Peterson: "Indeed if you are going to sue for wrongful discharge, I hardly know how else

Carrier can argue to the response other than with the testimony of the man who made the decision." (Lyons deposition P. 43), and later stated into the record that a man must "Obey first, grieve second." (Lyons Deposition P. 139) (Appendix E, page A-55). This interjection was on an issue in dispute between Railroad and Peterson and was clearly designed by Union to assist Railroad and damage Peterson.

Later, Union's counsel asked if it wasn't possible for Railroad to have discharged Peterson for insubordination rather than simply disqualifying him (Appendix E, page A-55).

This conduct of Union's counsel was a clear indication to the Board of Union's active opposition to Peterson in his claim against Railroad which the jury could certainly believe had an adverse effect on the Board against Peterson, thus tainting the arbitral process.

The persistence of Union counsel's antagonistic positions against Peterson while formally realigned with him on issues involving only his claim against Railroad, required objections during the depositions by Peterson's counsel in protest of such tactics, but to no avail. They continued unabated adding to Union's intended undoing of Peterson before the Board (Appendix E, pages A-55, A-56).

In its Order, the Seventh Circuit concluded that "adversary behavior by the Union in its own defense surely cannot be condemned if entered into in good faith" (Appendix A, page A-5). Here again, the Court erroneously assumed that such Union actions were done in "good faith". It is for the jury, not the Court, to determine whether Union's actions were good faith efforts to defend itself or bad faith actions to damage Peterson against Railroad.

The Court misapprehended the circumstances under which Union would be entitled to conduct itself in an adversary manner toward Peterson. Only in those matters wherein Peterson

and Union were at issue over Union's neglect in allowing the time limitation to expire could Union legitimately attempt to oppose Peterson. This obviously does not involve the 180 degree switch in positions heretofore referred to. In regard to the wrongful disqualification and discharge claim of Peterson against Railroad however, Union's efforts on behalf of the Railroad cannot be characterized as good faith defensive actions as a matter of law. The jury, not the judges, should determine this issue.

The Seventh Circuit also misapprehended *Vaca* v. *Sipes*, 386 U.S. 171, at 191-193, referred to at page 3 of its Order, wherein it characterizes *Vaca* as holding:

> ". . .unions are not required to press each grievance to arbitration; rather, they are expected to evaluate and screen grievances based upon assessments of their merit. . . ."

This is not supportive of Union's discard of Peterson if Union did not make its assessment of the merits in good faith. It cannot be said that all reasonable men would conclude, as did the Court of Appeals, that Union "decided in good faith" that the grievance was not a meritorious one.

The jury, from a consideration of the evidence taken in the light most favorable to Peterson, could reasonably find that Union breached its duty of fair representation to Peterson, thus undermining the integrity of the arbitral process, tainting the Board's decision and removing the bar of finality of the Board's Award against Peterson, thus precluding summary judgment.

As far as Railroad is concerned, the facts considered in the light most favorable to Peterson regarding the Railroad's wrongful disqualification of Peterson from his first shift telegrapher's position and Railroad's subsequent wrongful discharge of petitioner from employment, clearly precludes summary judgment on these two issues (Appendix E, pages A-40-A-49). Those facts present a jury question.

The United States District Court, in granting Railroad's Motion for Summary Judgment, did so on the ground that first, the Union as a matter of law did not breach its duty of fair representation so as to taint the arbitral process, and second that the Board's award against Peterson precluded Peterson's claim against Railroad in the District Court (Appendix D, page A-39). Thus, the District Court did not properly consider the facts exclusive of the Board's award in determining Peterson's wrongful disqualification and discharge claims against the Railroad. To say that the denial of Peterson's claims by the Board puts an end to the case against Railroad ignores the fact that *both* the issue of Union's breach of duty and Railroad's wrongful acts *must* be considered simultaneously with no consideration to be given to the Board's award since its validity and finality depends upon the determination of the Union's breach of duty.

The Court of Appeals likewise gave no consideration to this phase of the case since it erroneously found, as a matter of law, that the Board's process was not tainted, and therefore did not reach the issue or comment in its Order on evidence pertaining to the wrongful acts of Railroad. The fact that the Board denied Peterson's claims is not to be considered in determining the issues presented in this case. If the jury finds that the arbitral process was tainted by Union's breach of its duty of fair representation, the Board's decision is then clearly irrelevant and should receive no consideration whatsoever in determining whether Peterson is entitled to a jury trial against Railroad and Union in this action.

II.

The Seventh Circuit Has Adopted An Erroneous Standard To Determine Whether Union Breached Its Duty Of Fair Representation To Peterson

This case is far different than *Graf* v. *Elgin, Joliet & Eastern Railway Co., and Brotherhood of Railway Carmen, Local No.*

882, Case No. 82-1864, decided January 7, 1983 in the United States Court of Appeals for the Seventh Circuit (unpublished copy, Appendix F), cited by the Court in its Order (Appendix A). *Graf* purports to follow *Hoffman* v. *Lonza,* 658 F.2d 519 (7th Cir. 1981). In each of those cases, the only action complained of was the Union's simple forgetfulness of a deadline. No contention was made in *Graf* or *Hoffman* that the Union acted arbitrarily or perfunctorily or in bad faith or in any other way than mere forgetfulness. Even in *Hoffman,* the concurring opinion of Circuit Judge Cudahy held the question to be close.

The Seventh Circuit cases, namely, *Miller* v. *Gateway Transport Co., Inc.,* 616 F.2d 272 (7th Cir. 1980), *Baldini* v. *Local Union No. 1095, Intern. U., etc.,* 581 F.2d 145 (7th Cir. 1978), as well as those from other circuits, namely, *Ruzicka* v. *General Motors Corp.,* 523 F.2d 306 (6th Cir. 1975), *Ruzicka* v. *General Motors Corp.,* 649 F.2d 1207 (6th Cir. 1981), *Robesky* v. *Quantas Empire Airways, Ltd.,* 573 F.2d 1082 (9th Cir. 1978), *Beriault* v. *Local 40, Super Cargoes & Check, of I. L. & W.U.,* 501 F.2d 258 (9th Cir. 1974); and *Griffin* v. *United Auto Workers,* 469 F.2d 181, 183 (4th Cir. 1972); *Foust* v. *International Brotherhood of Elec. Workers,* 572 F.2d 710, 715 (10th Cir. 1978); and *Farmer* v. *ARA Services, Inc.,* 660 F.2d 1096, 1103 (6th Cir. 1981), establish standards that preclude summary judgment on the issue of fair representation when there is any evidence taken in the light most favorable to plaintiff upon which a reasonable inference could be drawn that a union arbitrarily ignored or perfunctorily processed a grievance. As stated in *Hoffman,* concurring opinion, page 524:

> " 'Egregious' behavior (not necessarily intentional), *Robesky,* 573 F.2d at 1089-91, apparently constitutes the triggering level of conduct for a union's breach of its duty of fair representation. . . ."

Also, as stated at page 524:

> ". . .The. . .appropriate standard, as set out by this court in *Baldini*, is whether the union has been 'guilty of malfeasance and [whether] its conduct was within the range of acceptable performance by a collective-bargaining agent.' (*Baldini*, 581 F.2d at 151 (quoting *Hines*, 424 U.S. at 568, 96 S.Ct. at 1058). . . .)"

and as stated in *Robesky*, page 1090:

> ". . .acts or omissions by union officials may be arbitrary if they reflect reckless disregard for the rights of the individual employee. . ." and "severely prejudice the injured employee."

These are the standards that should have been, but were not, followed by the Seventh Circuit.

It is apparent from the opinion in *Graf* (Appendix F, page A-58), which is cited by the Court in its Order (Appendix A, page A-5), that the standard now applied by the Seventh Circuit is more favorable to the Union than the standard previously followed by the Seventh Circuit in the cases of *Baldini* v. *Local Union No. 1095, Intern. U., etc.*, 581 F.2d 145 (7th Cir. 1978), and *Miller* v. *Gateway Transport Co., Inc.*, 616 F.2d 272 (7th Cir. 1980), as well as the standard followed by other circuits in the cases heretofore cited. The *Graf* standard reads as follows:

> ". . .The union has a duty to represent every worker in the bargaining unit fairly but it breaches that duty only if it deliberately and unjustifiably refuses to represent the worker. . . ." (Appendix F, page A-68)

In view of this obvious difference in the standards applied by the Circuits, petitioner respectfully suggests that this Court's supervisory action is needed to resolve the conflict. This is particularly so in this case in view of the fact that here, the President of a large Union, not an hourly paid part-time Union griever, was the person causing the damage to the Union member Peterson. Surely the duty to be imposed on such a

union speaking through its President should require more of the Union than the new Seventh Circuit test requires.

Nothing in *Vaca* v. *Sipes*, 386 U.S. 171, 191-193, 17 L.Ed.2d 842 (1966), and *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 566, 47 L.Ed.2d 231 (1976), indicates this Court's intent that such be the test. The Seventh Circuit, in announcing its new standard in *Graf*, first cited and then avoided following *Vaca*. At page 10 of the *Graf* decision (Appendix F, page A-67), the Seventh Circuit stated:

> "*Vaca* v. *Sipes*, 386 U.S. 171, 194 (1967), the Supreme Court's fullest discussion of the duty of fair representation, contains a pregnant dictum: 'In a case such as this, when [the worker with the grievance] supplied the Union with medical evidence supporting his position, the Union might well have breached its duty had it ignored [his] complaint or had it processed the grievance in a perfunctory manner.' The dictum was repeated in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 568-69 (1976), . . ."

One prime purpose of certiorari jurisdiction is to bring about uniformity of decisions among Federal Courts of Appeal when such conflicting tests between the circuits arise. Petitioner therefore prays that this Court, under the provisions of Supreme Court Rule 17(1)(a) grant review on Writ of Certiorari so as to establish a uniform standard to be followed in determining whether a union has breached its duty of fair representation in representing members in disputes with the employer.

CONCLUSION

As stated in *Margetta* v. *Pam Pam Corp.*, 501 F.2d 179 (9th Cir. 1974) at 180:

> ". . .it makes little difference whether the union subverts the arbitration process by refusing to proceed as in Vaca or follows the arbitration trail to the end, but in so doing

> subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation. The grievance procedure is nothing less than a 'sham'."

Such is the case here. The jury could clearly conclude the arbitral process was tainted by Union's acts or omissions.

Thus far, Peterson has been erroneously deprived of a trial by jury, to which he is entitled under the facts and law of this case. He prays that this Court grant certiorari and then grant him the right to a jury trial by reversing the summary judgment entered by the District Court and Court of Appeals and remand the case with directions that defendants be required to file their answers so the case may proceed to trial before a jury against both Railroad and Union.

Petitioner further prays that this Court grant certiorari so as to review the conflict between the Seventh Circuit and other circuits and announce the proper test to be followed in determining whether a union has breached its duty of fair representation to its member.

Respectfully submitted,

JAMES B. WHAM
WHAM & WHAM
212 East Broadway
P. O. Box 549
Centralia, Illinois 62801
(618) 532-5621

Attorneys for Petitioner-Plaintiff-Appellant, Paul W. Peterson

APPENDIX

APPENDIX A

Unpublished Per Curiam Order

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 10, 1983

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Richard A. Posner, Circuit Judge

No. 82-1895

Paul W. Peterson,
Petitioner-plaintiff-appellant,

v.

Chicago And Eastern Illinois Railroad Company, Transportation-Communication Employees Union, System Division No. 34 And Transportation-Communications Division, Brotherhood Of Railway, Airline And Steamship Clerks, Freight Handlers, Express And Station Employees,
Respondents-defendants-appellees.

Appeal from the United States
District Court for the Eastern
District of Illinois,
East St. Louis Division.

No. 68 C 99

Judge James L. Foreman

This cause was heard on the record from the United States District Court for the Eastern District of Illinois, East St. Louis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

ORDER

Plaintiff-appellant, Paul W. Peterson, is a former employee of defendant, Chicago and Eastern Illinois Railroad Co. (the "Railroad"), now merged with the Missouri Pacific Railroad Company. After being disqualified from his position as first-shift telegrapher and subsequently discharged by the railroad, he grieved, appealed and ultimately lost his claim for reinstatement and back pay. Peterson then asked the district court to reopen and review the results of the arbitration proceeding, on grounds that his union, now renamed and merged with the defendant Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (the "Union"), had breached its duty of fair representation and thus seriously undermined the arbitral process. The district court granted summary judgment for the defendants. We affirm.

I.

The plaintiff-appellant, Paul W. Peterson, was employed as a telegrapher by the defendant railroad at the Wansford Yard near Evansville, Indiana from 1945 to 1965. At the end of 1964, he was disqualified from the post of first-shift operator, on grounds that he had failed properly to fulfill the duties of the position by repeatedly delaying transmission of consist reports to the Chicago office. A hearing on the disqualification was scheduled for January 4, 1965, but then postponed in an attempt at settlement. The railroad offered Peterson a letter

agreement which would give him the right to return to his position, on condition that the railroad had the right to remove him if his performance continued to be unsatisfactory. He refused to sign the proposed agreement. After the failure of these settlement efforts, a hearing was held on January 11, 1965, at which Peterson was represented by the Union. His disqualification was nonetheless affirmed by the railroad. Thereafter, the Union filed a grievance, which was denied; the denial was appealed, but the grievance was again denied. In April of 1965, the Union notified Peterson that it had decided not to submit his grievance to the arbitration process provided by the Railway Labor Act, and advised him to settle with the railroad.

After being disqualified from his position as first-shift operator, Peterson was instructed by the railroad to perform other duties. He refused. He did not return to work, despite several instructions to do so and without submitting medical evidence of his inability to work. Consequently, a dismissal hearing took place on April 15, 1965. Mr. Peterson represented himself at this hearing, apparently not having asked the Union to represent him. On April 15, 1965 he was dismissed for failure to report to work. In May 1965, the Union grieved his dismissal, seeking reinstatement and back pay for him. The grievance was not resolved, however, through the internal grievance procedures; and on January 28, 1966, the Union told Peterson that the Union had decided not to appeal his claim to the Railroad Adjustment Board ("Board"), although he could do so individually by May 8, 1966. The Union's decision was based on its conclusion that Peterson's grievance lacked merit.

The Railway Labor Act provides that disputes which are not resolved between carriers and their employees (or employees' representatives) may be referred to the Board for arbitration. *See* 45 U.S.C. §§ 152, 153 (1976). If the employee's union does not pursue the grievance on his behalf, moreover, the employee is free to prosecute it on his own. *See* 45 U.S.C. § 153 First(i); *Essary* v. *Chicago & N.W. Transport. Co.*, 618 F.2d 13, 17 n.6

(7th Cir. 1980). However, the collective bargaining contract governing Peterson at that time required that any appeal to the Board be initiated by the employee or his representative within nine months of denial of the grievance by the carrier. Thus, although May 8, 1966, would have been timely for an appeal of the dismissal, Peterson's disqualification grievance had to have been appealed by November 16, 1965. On May 5, 1966, Peterson appealed the denial of both grievances to the Board. The disqualification grievance was denied on the grounds that the appeal was not timely filed, and the dismissal grievance was denied on the merits.

On July 11, 1968, Peterson appealed these denials to the district court, and in May 1971 amended his appeal to include a duty of fair representation suit against the Union. In an order of May 4, 1976, the district court ordered the case remanded to the Board for a hearing of both claims on their merits, realigning the Union as a party plaintiff. On January 11, 1980, the Board denied both the disqualification and the dismissal grievances on their merits. Peterson then appealed again to the district court, which entered summary judgment against him.

II.

In his appeal, Peterson attempts, first, to reargue to us the merits of his two grievances. However, in the absence of the statutory grounds for judicial review of an Adjustment Board award (none of which has been alleged here, *see* 45 U.S.C. § 153 First(q)), such awards are to be considered final and binding. 45 U.S.C. § 153 first(m); *Kotakis* v. *Elgin, Joliet & Eastern Railway,* 520 F.2d 570 (7th Cir.), *cert. denied,* 423 U.S. 1016 (1975). A court will reweigh the outcome of a final and binding arbitration only if the arbitral process has been tainted, or seriously undermined, by union conduct which is "arbitrary, discriminatory, or in bad faith." *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 566-71 (1976); *Vaca* v. *Sipes,* 386 U.S. 171, 190 (1967); *Baldini* v. *Local 1095, UAW,* 581 F.2d 145, 150 (7th Cir. 1978).

Thus the only way for Peterson to escape the finality of the arbitration award in this case is to show that his Union breached its duty of fair representation in such a way as to taint the arbitral process. In this respect, Peterson argues, variously, that the Union deceived him about the deadline for an appeal to the Board, refused to take his appeal in order to cover up its earlier mistake, changed its position at several times about his claim (for example, by first supporting his refusal to sign the letter agreement of January 4, 1965, and later advising him to sign it) and actively opposed his claim at various points—by advising him to report to work rather than supporting his refusal to do so, by refusing to represent him on remand although realigned as a plaintiff, and by various kinds of conduct during the defense of the duty of fair representation suit. Most of these claims are wholly devoid of merit. As the Supreme Court emphasized in *Vaca* v. *Sipes*, 386 U.S. at 191-93, unions are not required to press each grievance to arbitration; rather, they are expected to evaluate and screen grievances based upon assessments of their merit. The Union here clearly had the right to decide not to pursue Peterson's grievance when it decided in good faith that the grievance was not a meritorious one. After the Union had made that decision, its inactivity on his behalf was to be expected. Moreover, once sued for breach of the duty of fair representation, adversary behavior by the Union in its own defense surely cannot be condemned if entered into in good faith.

The only colorable claim that the Union breached its duty to Peterson is based on the Union's failure to inform him of the correct deadline for an appeal of the disqualification greivance. However, this failure amounts at most to negligence on the part of the Union, which does not suffice to support a breach of the duty of fair representation in this circuit. *Graf* v. *Elgin, Joliet & Eastern Railway*, No. 82-1864, slip op. at 11 (7th Cir. Jan. 7, 1983). Moreover, Peterson's disqualification grievance, although it was initially dismissed by the Board as untimely, was

ultimately remanded by the district court for rehearing; the Board then considered it upon the merits and denied it. Thus the mistaken information which the Union conveyed to Peterson about the period for an appeal cannot be said in any way to have tainted the arbitral process.

In sum, plaintiff-appellant has failed to show that there are any issues of material fact which might be resolved at trial showing that the Union breached its duty to him, thus lifting the bar of a final and binding arbitration award. Under such circumstances, the defendant's motion for summary judgment was properly granted. The order of the district court is therefore hereby AFFIRMED.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 39. Costs

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the the court.

(b) Costs For and Against the United States. In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) Costs of Briefs, Appendices, and Copies of Records. Unless otherwise provided by local rule, the cost of printing, or

otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

(e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

(As amended April 30, 1979, effective August 1, 1979.)

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS
60604

Cause No. 82-1895

Paul W. Peterson,
Petitioner-Appellant,

vs.

Chicago and Eastern Illinois
Railroad Company,
Respondent-Appellee.

and

Paul W. Peterson,
Plaintiff-Appellant,

vs.

Transportation-Communication
Employees Union, System Division No.
34, and Transportation-Communications
Division, Brotherhood Of Railway,
Airline And Steamship Clerks, Freight
Handlers, Express And Station Employees,
and Chicago And Eastern Illinois
Railroad Company,
Defendants-Appellees.

Appeal From the United
States District Court
For the Southern
District of Illinois

NO. CV 68-99

Honorable James L.
Foreman, Judge
Presiding

PETITION FOR REHEARING OF PETITIONER-PLAINTIFF-APPELLANT

Plaintiff-Appellant, Paul W. Peterson, respectfully petitions for a rehearing to reconsider the judgment entered in this action on May 10, 1983.

This Petition is of exceptional importance because material issues raised in Peterson's brief and reply brief were incorrectly determined in that the evidence was considered in the light most favorable to Defendants rather than Plaintiff as required by rules of law governing summary judgment procedure thus depriving Plaintiff-Appellant of his right to trial as guaranteed by the seventh, fifth and fourteenth amendments to the Constitution of the United States of America rendering the judgment in conflict with the following decisions:

Baldini v. *Local Union No. 1095, Intern. U., etc.*, 581 F.2d 145, 151 (1978 7th Cir.)

Miller v. *Gateway Transport Co., Inc.*, 616 F.2d 272 (7th Cir. 1980)

Kesner v. *National Labor Relations Bd.*, 532 F.2d 1169, 1175 (1976 7th Cir.)

Concurring opinion in *Hoffman* v. *Lonza*, 658 F.2d 519 (7th Cir. 1981)

Hines v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 566, 47 L.Ed.2d 231 (1976)

Vaca v. *Sipes*, 386 U.S. 171, 186, 17 L.Ed2d 842 (1966)

Impossible Elec. Tech. v. *Wackenhaut Prot. Systems*, 669 F.2d 1026, 1031 (5th Cir. 1982)

Margetta v. *Pam Pam Corp.*, 501 F.2d 179, 181 (9th Cir. 1974)

Robesky v. *Quantas Empire Airways Ltd.*, 573 F.2d 1082, (9th Cir. 1978)

Wyatt v. *Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980)

Tenorio v. *N.L.R.B.*, 680 F.2d 598, (9th Cir. 1982)

Beriault v. *Local 40, Super Cargoes & Check, of I.L. & W.U.*, 501 F.2d 258 (9th Cir. 1974)

This Petition is based on the following grounds:

1. In the opinion of the Petitioner Peterson, the Court has misapprehended and overlooked the rules of law governing consideration of the evidence on Motion for Summary Judgment and has drawn the following erroneous conclusions in favor of Defendants and against Plaintiff on material issues which Peterson is entitled to have determined by a jury, not a Judge:

(a) The Court's finding at page 2 of the Order that the Union's decision not to appeal Peterson's claim to the Railroad Adjustment Board "was based on *its conclusion* that Peterson's grievance lacked merit".

(b) The Court's finding at page 4 of the Order that:

"...The Union here clearly had the right to decide not to pursue Peterson's grievance when it decided *in good faith* that the grievance was not a meritorious one...."

(c) The Court's finding at page 4 of the Order that after the Union made the decision not to appeal Peterson's claim "its inactivity on his behalf *was to be expected*".

(d) The Court's finding at page 4 of the Order that:

> "...once sued for breach of duty of fair representation, adversary behavior by the Union in its own defense surely cannot be condemned if entered into in *good faith.*"

(e) The Court's finding at page 4 of the Order that:

> "The *only colorable claim* that the Union breached its duty to Peterson is based on the Union's failure to inform him of the correct deadline for an appeal of the disqualification grievance. However, this failure amounts at most to negligence on the part of the Union..."

(f) The Court's finding at page 4 of the Order that such failure set forth in (e) above "does not suffice to support a breach of the duty of fair representation in this circuit. *Graf* v. *Elgin, Joliet & Eastern Railway*, No. 82-1864, slip op. at 11 (7th Cir. Jan. 7, 1983)".

(g) The Court's finding at page 4 of the Order that the Board's denial of Peterson's disqualification claim on rehearing cured the Union's error and:

> "...Thus the mistaken information which the Union conveyed to Peterson about the period for an appeal cannot be said in any way to have *tainted the arbitral process.*"

(h) The Court's finding at page 3 of the Order that:

> most of the claims referred to by the Court in the last paragraph of page 3 "are *wholly devoid of merit*".

Peterson believes these are substantial errors for the following reasons:

The issue of Union's bad faith throughout the events involved in this action is a paramount issue. Nevertheless, both the District Court and this Court failed to follow this Court's holding in *Baldini* v. *Local Union No. 1095, Intern. U., etc.*, 581 F.2d 145, 151 (1978 7th Cir.) wherein the Court stated:

> "...Where a choice of inferences is possible from summary judgment materials, the inference must be drawn that favors the party resisting summary judgment.... We note also in this regard the sound axiom that questions of motive, design and intent are particularly inappropriate for summary adjudication...."

If the decision of Union to not appeal Peterson's case was a bad faith determination, the jury can consider such evidence in making its determination of whether Union breached its duty of fair representation in the first instance. The Court in its finding, however, referred to in (a) and (b) above misapprehended and overlooked the inferences of bad faith that could reasonably be drawn by the jury as suggested in Peterson's brief at page 38-43.

The Court misapprehended and overlooked the test set forth in the case cited by Peterson at page 31 and 32 of his brief being the case of *Impossible Elec. Tech.* v. *Wackenhaut Prot. Systems,* 669 F.2d 1026, 1031 (5th Cir. 1982) which requires the moving party, Union and Railroad—not Peterson, to "demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied..."

It cannot be said that all reasonable men would conclude, as did the Court in (b) above that the Union "decided in good faith that the grievance was not a meritorious one". It is for the jury, not the Court, to weigh the Union's self-serving contention that it did make a good faith appraisal of the merits.

As recently stated by the Supreme Court of the United States in *United States Postal Service Board of Governors, Petitioner* v. *Louis H. Aikens*, -US-, 75 L.Ed.2d 403, 411 in a Title VII of the Civil Rights Act case:

> "All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult.... There will seldom be 'eyewitness' testimony as to the employer's mental processes.... The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago:
>
> > 'The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else.' *Eddington* v. *Fitzmaurice*, 29 Ch Div 459, 483 (1885)."

The Court overlooked Peterson's contention at page 38 of his brief that:

> "The question of motive and design in the Union's handling of this case involve thought processes locked into the minds of Union officials."

The Court further misapprehended the test governing its determination as to whether Union's motive and designs were based on good or bad faith. The Court made the determination itself rather than following the rules set forth in *Impossible Elec. Tech.* wherein it states at page 1031:

> "...All reasonable doubts about the facts should be resolved in favor of the non-moving litigant.... A court must not decide any factual issues it finds in the record, but if such are present, the court must deny the motion and proceed to trial.... Summary judgment may be inappropriate even where the parties agree on the basic facts,

> but disagree about the factual inferences that should be drawn from these facts...."

The Court misapprehended and overlooked its holding in *Miller* v. *Gateway Transport Co., Inc.*, 616 F.2d 272 (1980 7th Cir.), 276-277 that:

> "...The union's duty includes more than merely a 'perfunctory' processing of a grievance. '[A] good faith effort to plead plaintiff's case' is required...."

It is for the jury rather than the Court to determine whether the Union perfunctorily processed the grievance in connection with its determination of the merits.

All of the cases cited above, namely, *Miller, Baldini, Robesky* v. *Quantas Empire Airways Ltd.*, 573 F.2d 1082, (9th Cir. 1978), *Beriault* v. *Local 40,* establish standards that preclude Summary Judgment on the issue of fair representation where there is any evidence taken in the light most favorable to the Plaintiff upon which a reasonable inference could be drawn that a Union arbitrarily ignored or perfunctorily processed a grievance. As stated in *Hoffman* v. *Lonza,* 658 F.2d 519 (7th Cir. 1981) in the concurring opinion at page 524:

> " 'Egregious' behavior (not necessarily intentional), *Robesky,* 573 F.2d at 1089-91, apparently constitutes the triggering level of conduct for a union's breach of its duty of fair representation..."

Also, as stated at page 524:

> "...The...appropriate standard, as set out by this court in *Baldini,* is whether the union has been 'guilty of malfeasance and [whether] its conduct was within the range of acceptable performance by a collective-bargaining agent.' *Baldini,* 581 F.2d at 151 (quoting *Hines,* 424 U.S. at 568, 96 S.Ct. at 1058)...."

and as stated in *Robesky*, page 1090:

> "...acts or omissions by union officials may be arbitrary if they reflect reckless disregard for the rights of the individual employee..." and "severely prejudice him."

See also *Tenorio* v. *N. L. R. B.*, 680 F.2d 598, (9th Cir. 1982) at 601-603.

The Court overlooked the fact that a reasonable inference may be drawn that Union's decision was not the result of the good faith appraisal but was dictated by improper motives of Union to cover up its mistake in hopes that Peterson would never carry his case to the present.

The Court also overlooked *Margetta* v. *Pam Pam Corp.*, 501 F.2d 179 (9th Cir. 1974) at 180 cited at page 44 of Peterson's brief that:

> "...it makes little difference whether the union subverts the arbitration process by refusing to proceed as in *Vaca* or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation. The grievance procedure is nothing less than a 'sham'."

The Court misapprehends *Vaca* v. *Sipes*, 386 U.S. 171, at 191-193 referred to at page 3 of the Order wherein it characterizes *Vaca* as holding:

> "...unions are not required to press each grievance to arbitration; rather, they are expected to evaluate and screen grievances based upon assessments of their merit...."

It is not supportive of Union's discard of Peterson if Union did not make its assessment of the merits in good faith. It cannot be said that all reasonable men would conclude, as did the Court, that Union "decided in good faith" that the grievance was not a meritorious one.

Also the Court in its finding as set forth in (e) above overlooked the reasonable inferences that a jury could legitimately draw from the facts set forth in Peterson's brief at pages 24-26 and the analysis in Peterson's argument (Brief page 45-49 and Peterson's reply brief pages 17-21). The Union's failure to inform Peterson of the correct deadline is not the "only colorable claim" that the jury could reasonably infer from these facts. Therefore, Petitioner respectfully submits that the Court overlooked these inferences which could be drawn in concluding that it was for the Court to make the determination rather than for the jury.

The jury had the right to conclude that once an inference was drawn by the jury that the Union's motive was bad in refusing to take the appeal, that every action thereafter was motivated in self interest by the Union in its continual attempt to make certain Peterson was ultimately defeated before the Board in his claim against Railroad.

The Court overlooked its holding in *Kesner* v. *National Labor Relations Bd.*, 532 F.2d 1169 (1976 7th Cir.), at page 1175, wherein the Court stated:

> "...It is venerable tort law that purporting to take action where duty is nonexistent creates in itself certain duties, or as the Board puts the matter, 'it is a commonplace of our jurisprudence that those who act where they are not obliged to are nevertheless liable for misfeasence [sic] in the course of their undertaking.'..."

As stated in *Kesner* (page 1175):

> "...When one's own representative who has been willing to assume that status proclaims a lack of merit, it is indeed likely to be a *coup de grace* to the claim...."

The jury, not the Court, should draw the inference that Union's motive in first, moving to realign as Plaintiff along

with Peterson in his attempt to obtain a rehearing before the Board on both the disqualification and dismissal charges, was again a motive of self interest so that Peterson would be forced to a hearing in front of the Board without the assistance of Union. The Court in concluding at (d) above that Union could not be considered as violating its duty by its "adversary behavior", overlooks the fact that qualifying phrase is appended by the Court to its Order, namely, if that representation is "entered into in good faith". Here again the Court misapprehends the forum that is to make that determination of good or bad faith. Petitioner respectfully submits that such determination can only be made by a jury, not a Judge, when taken in context with all of the facts viewed in the light most favorable to Plaintiff.

The same can be said with reference to the numerous incidents referred to in Peterson's brief and reply brief pertaining to Union's conduct during the course of the litigation between Peterson and Railroad.

The Court misapprehended the circumstances under which Union would be entitled to conduct itself in an adversary manner toward Peterson. It is not in all matters, but only in those matters wherein Peterson and Union were at issue over Union's conduct in allowing the time limitation to expire.

When Union successfully became realigned as a result of its own efforts, with Peterson in obtaining a remand of the disqualification and dismissal charge against the Railroad to the Board, the jury could draw the inference that the Union acquired a duty to Peterson after interjecting into a matter that did not concern itself. The Court misapprehended and overlooked this factor in stating at page 3 and 4 of its Order and relying on *Vaca:*

> "...unions are not required to press each grievance to arbitration..."

This holding in Vaca did not contemplate or involve such a set of facts as in the instant case.

The Court at (g) above misapprehends the effect of the Board's denial of Peterson's claim on rehearing. The mere fact that the Board considering the case on its merits upon remand held against Peterson does not resolve the question of Union's conduct inasmuch as the jury, not the Court, should draw the inferences from the facts as to whether or not the arbitral process of the Board had been tainted by the Union's actions and nonactions in connection with its Union member Peterson. Here again, Petitioner respectfully submits that the Court misapprehended the rule governing the Court in Summary Judgment matters as set forth in *Impossible Elec. Tech.* quoted at pages 31 and 32 of Peterson's brief.

2. In the opinion of the Petitioner the Court has misapprehended and overlooked the issue raised by Peterson with regard to the Railroad at pages 34 and 35 with respect to the claim that Railroad blackballed Peterson on each occasion that he attempted to obtain employment from other railroads after his discharge. The Court in overlooking this claim misapprehended the facts set forth which are sufficient to raise a jury question on the issue.

3. In the opinion of the Petitioner the Court has misapprehended and overlooked Peterson's contention referred to at pages 21 and 22 of his brief. There it is set forth that the Union acknowledged it knew the Union board members had voted for Peterson on his wrongful disqualification and discharge claims before the Board on rehearing. One of two results must follow. First, the inference arising from the vote of Union board members supports Peterson's contention that the case was worthy of appeal and that such fact should be considered by the jury, not the Court, in determining whether or not the Union made a bad faith determination not to appeal on behalf of Peterson. Secondly, in the event the acknowledgment of Union

bespeaks the fact that in all cases there is an automatic deadlock between Railroad members of the Board and Union members of the Board, then Peterson did not receive a due process hearing inasmuch as the Railroad board members would automatically deadlock against Peterson. It necessarily follows in such event that the whole system of hearings under 45 U.S.C.A. Sec. 153 represents an indefensible charade operating under the guise of due process and that Peterson should therefore be entitled to a jury trial irrespective of the holding of the Board and irrespective of the position stated by Union and Railroad concerning the statutory law governing the Board since it is obvious that he has been denied a fair hearing and due process as contemplated by the fifth and fourteenth amendments to the Constitution of the United States. Petitioner respectfully submits that the Court's Order did not make any determination on this element of the case.

WHEREFORE, Plaintiff-Appellant, Paul W. Peterson, respectfully requests that this Court grant a rehearing.

Dated this 23rd day of May, 1983.

Respectfully submitted,

JAMES B. WHAM
WHAM & WHAM
212 East Broadway
P.O. Box 549
Centralia, Illinois 62801
(618) 532-5621

Attorneys for Plaintiff-Appellant,
Paul W. Peterson

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 21, 1983

No. 82-1895

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge

Hon. Richard D. Cudahy, Circuit Judge

Hon. Richard A. Posner, Circuit Judge

Paul W. Peterson,
Petitioner-Plaintiff-Appellant,

vs.

Chicago and Eastern Illinois Railroad Company, Transportation-Communication Employees Union, System Division No. 34 and Transportation-Communications Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees,
Respondents-Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.

No. CV 68-99

James L. Foreman, *Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Paul W. Peterson, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 68-99

Paul W. Peterson,
Petitioner,

vs.

Chicago And Eastern Illinois
Railroad Company,
Respondent.

Paul W. Peterson,
Plaintiff,

vs.

Transportation-Communications
Employees Union, etc., et al,
Defendants.

ORDER

(Filed March 10, 1982)

FOREMAN, Chief Judge:

Before the Court are four motions: (1) Motion for Summary Judgment or in the Alternative Answering Supplemental Count I, filed by the Missouri Pacific Railroad Company, successor by merger to named respondent-defendant Chicago & Eastern Illinois Railroad Company (C&EI), on August 10, 1981; (2) Motion (to file additional counts to supplemental petition), filed by plaintiff on August 17, 1981; (3) Motion for Summary Judgment on Counts II, III, IV and V of plaintiff's First Amended Petition and Counts II, III and IV of the Amended, Supplemental Petition, filed by defendant Transportation-

Communications Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC) on September 9, 1981; and (4) Motion to Dismiss the Amended, Supplemental Petition, filed by BRAC on September 9, 1981.

I. Brief History

Because this litigation spans over a decade and sports a complex procedural pedigree, a brief history is in order. Petitioner-plaintiff Peterson ("plaintiff") was "disqualified" from his position as a first shift telegrapher at the Wansford Yard of the Chicago & Eastern Illinois Railroad Company (C&EI), near Evansville, Indiana, on December 23, 1964. Various discussions between union representatives and management followed, culminating in a denial of his claim by the highest responsible company official. In the meantime, because plaintiff refused to return to another job with the railroad under conditions negotiated for him by the union (which he deemed unacceptable) and did not justify his absence with a medical reason, the railroad dismissed him on April 15, 1965. After more discussion and an affirmance of the dismissal by railroad General Manager Vierling on August 10, 1965, the union, per Mr. General Chairman Hayes, informed plaintiff on January 28, 1966 that the union would not longer handle his case, but that he could refer it to the National Railroad Adjustment Board ("the Board"). The union reached this decision apparently because it felt the claim would be unsuccessful before the Board.

On May 5, 1966, plaintiff referred his disqualification and dismissal to the Board. He relied in filing on the union's advice that to be timely he must file before May 8, 1966. On October 31, 1967, the Board entered its Award No. 15924 in the appeal. The Board denied plaintiff's disqualification claim for failure to file within the nine month time limit afforded by the collective bargaining agreement, and denied the claim for wrongful dismissal on the merits. The Board concluded that there was no

support for the allegation "that Carrier has abused its authority by acting in an arbitrary, capricious or discriminatory manner."

Dissatisfied with this result, plaintiff filed a petition for judicial review in this Court on July 11, 1968,[1] which allows for review of Board decisions, but also provides that findings of the Board are conclusive on the parties. Since the only exceptions to this conclusivity provision are (1) failure of the Board to comply with the requirements of the statute, (2) failure of the order to remain confined within the Board's jurisdiction and (3) fraud or corruption of a Board member, plaintiff alleged that the Board exceeded its jurisdiction when it deprived him of his due process rights and exceeded its statutory authority. On April 22, 1969, the Court allowed plaintiff to amend his complaint and add the union and the railroad as parties defendant.

On May 6, 1971, the plaintiff filed his First Amended Petition, consisting of five counts. The First Amended Petition sought the following relief: (1) Count I sought administrative review of the Board decision of October 31, 1967, pursuant to 45 U.S.C. §153 (c); (2) Count II, directed against the Transportation-Communication Employees Union, System Division No. 34, plaintiff's union at the time of discharge and predecessor of BRAC, sought relief for breach of the duty of fair representation; (3) Count III sought relief on the same grounds as Count II, but was leveled at both the union and the railroad; (4) Count IV sought relief on the same grounds as Count II, but was directed at BRAC, the successor union; and (5) Count V also reiterated Count II, but sought relief from both BRAC and the railroad.

---

[1] Plaintiff filed his original petition in the old Eastern District of Illinois. By order of Congress dated October 2, 1978, the case came within the jurisdiction of the new Southern District of Illinois, effective March 31, 1979.

In the years between 1971 and 1976, the parties presented the Court with motions, including those for summary judgment and for dismissal, which the Court denied. The Court scheduled final pre-trial proceedings for November 20, 1975, and trial for December 8. At the scheduled pre-trial, the Court ordered, by suggestion of the union, that it be realligned as a plaintiff as to Count I, only. The union thought that the litigation could be resolved best by putting plaintiff's entire claim, both disqualification and discharge, before the Board once again for full determination on the merits of both. Plaintiff, who sought by virtue of Count I the same thing, objected to the reallignment. A two day trial was held on December 10 and 18, 1975, on Count I only. On May 4, 1976, this Court remanded the claim to the Board, on grounds that the arbitrary and uncertain appeal procedures rendered Award No. 15924 "arbitrary, capricious, actually and indisputably without foundation in fact or reason and in violation of the statutory requirements of Section 3, First (i) and (m): of 45 U.S.C. §15 First (i) and (m). The Court set aside the award in full and ordered a new hearing on both claims. At the same time the Court stayed proceeding on Counts II through V of the First Amended Petition.

The Board rendered its new decision on January 11, 1980, and delivered it to the Court on January 28, 1980. In Award No. 22697, the Board denied both claims on the merits. The decision was rendered on the basis of a 791-page record which the Board delivered to the Court on April 7, 1980. By order of June 24, 1981, the Court allowed plaintiff to file a Supplemental Count I attacking the new Board decision, since Count I of the First Amended Petition had been rendered nugatory by the May 4, 1976 remand order. The Court lifted the stay on Counts II through V of the First Amended Petition and ordered responsive pleadings. Plaintiff sought on July 27, 1981 to file an additional "amended supplemental petition." This supplemental petition sought relief against BRAC, the railroad, and BRAC and the railroad jointly, for breaches of the duty of fair representation for activities occurring *after* the 1976 remand

order. For the first time, plaintiff included against the railroad allegations of deprivation of third party beneficiary rights vested in him by the collective bargaining agreement. The Court denied this motion on July 29, 1981, for failure to comply with the Local Rules.

Before plaintiff could refile his amended supplemental petition, the C&EI moved for Summary Judgment, on August 10, 1981. A week later, on August 17, 1981, plaintiff moved again to file his amended supplemental petition, this time by moving to file additional counts to the Supplemental Petition already allowed by the Court on June 24, 1981. On September 9, 1981, BRAC moved for Summary Judgment on Counts II, III, IV and V of plaintiff's First Amended Petition and Counts II, III and IV of his Amended, Supplemental Petition. The motions just described are those currently before the Court.

II. Motion (To File Additional Counts to Supplemental Petition)

At the status conference of December 2, 1981, counsel for plaintiff, while arguing his Motion to File Additional Counts to Supplemental Petition, indicated that he did not intend to abandon Counts II through V of his First Amended Petition. This makes good sense, since the allegations of the latter involve acts occuring prior to 1971 and those of the former acts occurring since the remand order of May 4, 1976. Considering the age of this litigation, the fact that both defendants have already responded to the supplemental counts, the liberal amendment standards of Rule 15 and the absence of any prejudice to the defendants, the Court hereby GRANTS plaintiff's motion.

III. C&EI's Motion for Summary Judgment

In its Motion for Summary Judgment, the C&EI argues that the full hearing before the Board on the merits of both claims is the ultimate relief plaintiff has been seeking and, now that it has

been granted, must be affirmed since none of the grounds for reversal are present. It further argues that since summary judgment is proper on Count I, it must be granted on the remaining counts as well. Plaintiff contends that it is apparent from the record that the Board did not confine itself to matters within the scope of its jurisdiction and that plaintiff did not receive a due process hearing, either "on the premises" or before the Board.

The statute allowing review of the Board's decision provides as follows:

> On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside in whole or in part, or remanded to the division to comply with the requirements of this Act, for failure of the order to conform or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or the corruption by a member of the division making the order.

45 U.S.C. §153 First (q). As the Supreme Court of the United States has stated, judicial review is limited to three grounds: (1) failure of the Board to comply with the Railway Labor Act; (2) failure of the Board to conform or confine itself to matters within its jurisdiction; and (3) fraud or corruption. *Union Pacific R.R. Co.* v. *Sheehan*, 439 U.S. 92 (1978). Awards may not be disturbed on the grounds that the Board disregarded evidence, misinterpreted contract provisions or was clearly erroneous. The Seventh Circuit Court of Appeals in *Kotakis* v. *Elgin, Joliet & Eastern Ry. Co.*, 520 F.2d 570, 574 (7th Cir.), *cert denied*, 423 U.S. 1016 (1975), held that a denial of due process in the hearing can be grounds for reversal of the Board's order. Denial of due process falls under exception number two, exceeding the Board's jurisdiction. Denial of due process in this context is an award "actually and indisputably without foundation in reason or fact," or "wholly baseless and without reason." *ID.* at 574-75.

In his Supplemental Count I, plaintiff does not allege failure of the Board to comply with the Act, nor does he allege corruption or fraud. His attack is solely limited to one based on due process. It seems fairly clear from plaintiff's arguments that he misunderstands the nature of review under 45 U.S.C. §153 First (q). He deems it "essential that the record be examined upon which the Board rendered its award in order to determine whether or not it should be set aside or affirmed by this Court." Further,

> [i]t is not a sufficient answer for the Railroad to say, "He had a hearing before the Board." This is not an end-all of the question. Such a philosophy preferring form over substance would legitimatize a miserable charade - announcing to the world that the phrase "due process" is nothing but a hollow sound, and that the constitutional guarantee of due process is nothing but the pious platitude of an empty promise.

Plaintiff's Memorandum in Opposition to Motion for Summary judgment, August 26, 1981, at 4. Of course, in a limited sense, he is correct. The Court must examine enough in the record to determine whether the award is without foundation in reason or in fact. But, the Court may not, as plaintiff seems to suggest, read the record and weigh the testimony for itself.

The Court has made a review of the 791 page record and has found, to say the very least, more than enough evidence to show that there is foundation in both reason and fact for the Board's decision. Appearing at pages 439 through 497 of the record is a transcript of an investigation hearing held at Chicago Heights on January 11, 1965, for purposes of deciding the disqualification claim. There was ample testimony from Mr. Maddock, Mr. Cable, Mr. Huffaker, Mr. Pickering and Mr. Jett that plaintiff Peterson, whatever his technical telegraphy skills, was not fulfilling properly the duties assigned to him. Many testified that when Peterson was absent, the work was "cleared" and

completed at an early hour of the morning but that when he was on the job, the work was not finished. The testimony depicts an obstinate man who telegraphers in other stations had difficulty accommodating. Several testified that he was a poor or extremely poor sender. While this may or may not have been entirely true, it was for the Board to decide. At any rate, it is clearly enough to remove this aspect of the award from the wholly without foundation in fact or reason category.

The same is true with respect to the investigation hearing held April 9, 1965 at Danville, Illinois for purposes of deciding the dismissal claim. Mr. Pape testified as to his efforts to contact plaintiff and inform him that he must return to work or provide a valid reason for failure to do so. At page 516 of the record, plaintiff acknowledged that he had received the letters informing him to return to work, but retorted that "any thinking person should know [he] was sick." R.516. When asked for a letter from a doctor, he stated he was "not sick physically - or mentally - just sick at heart..." *Id.* He also explicitly stated that he would not return to work on anything other than the C&EI first trick (from which he had been disqualified). Plaintiff did attempt at pages 516-17 to paint a picture that he was being "railroaded," so to speak, by company officials since he had displeased chief Telegrapher Cable with his performance, which suffered from what he felt was a crushing workload at Wansford Yard. Yet, again, weighing these arguments was the Board's task, and not that of this Court. It is more than obvious that the record contained evidence on which to base its January 11, 1980 denial on the dismissal claim which removed the decision from the category of without basis in fact or reason.

The rest of plaintiff's brief offers nothing supportive of its position. Plaintiff argues that the awards are based on facts not in evidence, but never states what those supposed facts are. His seventy-eight page "ExParte Submission," already a part of the Board record, argues that he never received notice of his poor performance or that he should sign up on another work board.

Not only does the above review of the evidence contradict this line of argument, but it demonstrates that plaintiff actually desires that this Court do something the Supreme Court has repeatedly said it may not do, that is, reweigh the evidence. *See, Sheehan, supra,* 439 U.S. at 93. The exlusive, primary jurisdiction of adjustment boards established under the Act to determine the merits of grievances has been long established under federal law. *Slocum* v. *Delaware Lackawanna & W. R.R.*, 239 U.S. 225 (1950). Congress amended the Act in 1966 to provide flatly that awards of the Board "shall be final and binding." 45 U.S.C. §153 First (m).

Plaintiff has alleged the existence of no disputed issue of material fact which casts doubt on the validity of this holding. He has only urged this Court to reweigh evidence and second guess the standards employed by the Board in its decision. Accordingly, entry of summary judgment pursuant to Rule 56 is proper on Supplemental Count I.

The C&EI also seeks summary judgment on the remaining counts. Since this issue is intertwined with that of the alleged breach of the union's duty of fair representation, the Court shall consider it with the latter, below.

The C&EI also seeks summary judgment on its "counterclaims." The Court is unable to find in this voluminous file any counterclaims filed by C&EI against the plaintiff or the other defendants (although the two unions involved, T-CEU and BRAC, did file cross-claims against the C&EI on March 1, 1972 and the C&EI answered on August 29, 1972). Accordingly, the C&EI is entitled to nothing on the non-existent counterclaims.

IV. BRAC's Motion for Summary Judgment on Counts II, III, IV and V of Plaintiff's First Amended Petition and Counts II, III and IV of the Amended, Supplemental Petition

A. Counts II, III, IV and V of Plaintiff's First Amended Complaint.

For purposes of ruling on the summary judgment motion as it relates to these counts, the Court makes the following findings of fact:[1]

1. In Counts II through V of the First Amended Complaint, it is alleged that officials of the Transportation-Communication Employees Union (plaintiff's union representative at the time of the events in question, which was merged into BRAC and ceased to exist in 1969) were guilty of various acts of negligence in representing plaintiff in connection with his claims, and breached its duty of fair representation by "arbitrarily, capriciously and without just reason or "cause" refusing to carry his claims to the Board, and that plaintiff was "wrongfully deprived of an appeal" to the Board on the merits of his claims by reason of the alleged acts and omissions of his union representative. The gravamen of plaintiff's claims against BRAC in all counts is the allegation in paragraph 22 of the First Amended Petition (paragraph 18 of the Amended Supplemental Petition), that, had petitioner's grievances "been processed in a proper manner" by BRAC, the Board would have entered an award in plaintiff's favor on the merits, and would have ordered his reinstatement to his position as first shift telegrapher at Wansford Yard and reimbursed him for all lost wages.

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[1] In Counts II through V of the First Amended Complaint, Count I for administrative review is incorporated by reference. Inasmuch as the Court has already granted summary judgment on Count I, it will not be considered in the course of this discussion.

2. As a result of discussions between counsel for the parties and the Court at a pre-trial conference held on November 20, 1975, the Court granted a motion by BRAC to be realigned as co-petitioner with plaintiff on Count I only, ordered that Count I be severed for separate trial, and ordered that the issues with regard to Counts II through V pend further action or order of the Court. BRAC, as co-petitioner on Count I, then filed a motion for order remanding proceedings to the Board. In this posture, the cause was heard by the Court on Count I and on the motion for order of remand, and on May 4, 1976, this Court entered an order granting the motion of remand and directing the Board to consider petitioner's claims for both wrongful disqualification and wrongful discharge *de novo*. At that time, proceedings in this case on Counts II through V were stayed.

3. In September 1977, plaintiff initiated a new submission to the Board pursuant to the Court's order of May 1976, on both the disqualification and discharge claims. Both plaintiff and the Railroad filed lengthy ex parte and rebuttal submissions which included extensive excerpts from deposition testimony taken in this action. The carrier and labor representatives on the Board reached deadlock, and a neutral referee was named to determine the issues. Plaintiff was accorded the opportunity to appear before the neutral referee in person and by counsel, pursuant to the order of this Court, and fully availed himself of that opportunity. On January 11, 1980, the referee entered his award, denying both the disqualification and dismissal claims on the merits, as follows:

> The Board finds the carrier had substantial grounds for disqualifying claimant from the position of first shift telegrapher at Wansford Yard. It further finds that claimant's refusal to perform service for the carrier, other than the position from which he had been disqualified, was insubordination and therefore carrier had just cause for dismissing him from its service.

The award further stated that, even if the disqualification claim had been meritorious, the wrongful discharge claim would still have been denied because of plaintiff's refusal to return to work and make himself available for service other than in the position from which he had been disqualified:

> When carrier directed him to make himself available for service, he was required to do so. Reliance on asserted injustice and impropriety in his disqualification from the first shift telegrapher's position is misplaced. His recourse lay in the grievance procedure, not in self-help.

4. Following receipt of the Board's award of January 11, 1980, plaintiff sought leave of court to file an amended supplemental petition, seeking a further order of remand to the Board. On June 24, 1981, the Court entered an order granting plaintiff's motion for leave to file his petition as a supplemental Count I (Petition for Review). The Court further ordered the secretary of the Board to file a true or certified copy of the entire record of the proceedings for the Board on remand with this Court (which was done on July 20, 1981), ordered the Railroad to file responses to supplemental Count I within twenty days thereafter, and vacated the stay of proceedings on Counts I through V of the First Amended Petition. On July 24, 1981, plaintiff filed a further motion for leave to amend his pleadings to add supplemental Counts II through IV

5. The affidavit of Dean T. Echols, the man who, in 1965 handled the administrative processing of plaintiff's grievance, establishes that the union refused to process further plaintiff's claims solely based on their opinion that it had no merit and that the Board would find that the C&EI had just reason for discharge.

6. The affidavit of Echols and the letters sent by union president Leighty to General Chairman Hayes, attached to the affidavit as Exhibits A and B, establish that the union president, Mr. Leighty, did not think the claim had merit.

Based on the following facts, BRAC should prevail on its summary judgment motion with respect to Counts II through V.

The elements of the duty have been set forth by the Supreme Court. Under the decisions, a union breaches its duty when its conduct is "arbitrary, discriminatory, or in bad faith, as, for example, when it arbitrarily ignores a meritorious grievance or process[es] it in [a] perfunctory fashion." *IBEW* v. *Foust*, 442 U.S. 42, 46 (1979); *Vaca* v. *Sipes*, 386 U.S. 171, 191 (1967). There is no right to have meritless grievances processed, and there is no breach of the duty of fair representation arising from any act or omission to act by a union in connection with such a claim. *Whittier* v. *Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1341 (6th Cir. 1975); *Patterson* v. *Teamsters*, 405 F.Supp. 980, 987 (S.D. Ill. 1976). As the high court has stated "[i]f an individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery...would be substantially undermined..." *Vaca, supra*, 386 U.S. at 191. "The union need not arbitrate every grievance...The union has a duty to screen grievances and to arbitrate only those the union believes are meritorious." *Melendy* v. *United States Postal Serv.*, 589 F.2d 256, 259 (7th Cir. 1978). "Even if an employee claim warrants arbitration, a union may properly reject it unless its action is arbitrary or taken in bad faith." *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 820 (7th Cir. 1972).

In this case, BRAC has demonstrated with the Echols affidavit and the attached exhibits that the union refusal to process the claim was based solely on a good faith assessment of its merit. Furthermore, the subsequent denial of plaintiff's claims by the Board and affirmance of that decision by this Court indicate that the claim in fact was meritless. Plaintiff on the other hand, has introduced nothing to controvert these established facts, but instead, relies upon his pleadings. This he may not do successfully for Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Fed.R.Civ.P. 56(e). Here, the union has established good faith conduct and the Board, backed by this Court, has determined the grievance to be meritless. Clearly, summary judgment is proper on these Counts.

B. Counts II, III and IV of the Amended Supplemental Petition

For purposes of ruling on the summary judgment motion on Counts II, III and IV of the Amended Supplemental Petition, the Court makes the following findings of fact:

1. Count I of the Amended Supplemental Petition is the same supplemental Count I which plaintiff was permitted to file by the Court's order of June 24, 1981, and seeks no relief against defendant BRAC. Paragraphs 1 through 18 of Counts II, III and IV merely restate the matters alleged in Counts II through V of the First Amended Petition and add nothing further thereto. The matters contained in these paragraphs are subject to the motion of defendant BRAC for summary judgment on Counts II through V of the First Amended Petition. For purposes of this motion, the Court will therefore consider only the allegations of paragraphs 19 through 26 of Count II and in paragraphs 27 through 33 of Counts III and IV of the Amended Supplemental Petition, which relate to matters allegedly occurring during the pendency of this suit.

2. Counts II through IV of the Amended Supplemental Petition seek to assert "further and additional" breaches of duty of fair representation arising from actions by said defendant dur-

ing the pendency of this lawsuit. Specifically, plaintiff alleges in paragraph 22 of each of said counts that said defendant was guilty of further breaches of its duty of representation by assisting the C&EI in examination of witnesses in depositions "in an adversary manner against petitioner;" in refusing to appear for and represent petitioner in the proceedings before the National Railroad Adjustment Board (the "Board") on remand; in taking positions "contrary to the best interest of petitioner" with respect to interpretation of the collective bargaining agreement; in disclosing information which the union had received from petitioner and others; and in withholding support and representation from petitioner, "knowing that such withholding would have an adverse effect on petitioner's cause," before the Board.

3. The affidavit of Dean T. Echols, the man who, in 1965 handled the administrative processing of plaintiff's grievance, establishes that the union refused to process further plaintiff's claims solely based on their opinion that it had no merit and that the Board would find that the C&EI had just reason for discharge.

4. The affidavit of Echols and the letters sent by union president Leighty to General Chairman Hayes, attached to the affidavit as Exhibits A and B, establish that the union president, Mr. Leighty, did not think the claim had merit.

Based on the foregoing facts, BRAC should prevail on its summary judgment motion with respect to Counts II through V.

If plaintiff's claims were meritorious, or if the union had acted arbitrarily, discriminatorily or in bad faith, plaintiff might possibly succeed on Counts II through IV of the Amended Supplemental Petition. However, as noted above, affidavits, exhibits, and the decision of the Board demonstrate that the claims lacked merit and the union acted in candid fairness. Thus, any claim based on bad faith or the meritorious quality of the grievance is vitiated.

Plaintiff has also noted that the union, by not representing him before the Board, somehow prejudiced him before the Board by its conspicuous absence. The argument here is that, if the man's own union will not support him, neither will the Board. This position is without merit. First, at the time this Court remanded the case for *de novo* consideration before the Board, it was certainly not contemplated that the union would represent plaintiff before the Board. He was already represented by his present, very able counsel. The union, which was a party defendant in plaintiff's suit since 1971 and exposed to potential liability of $600,000, could hardly have represented plaintiff without a severe conflict of interest. Second, the claims were ultimately referred to an impartial referee when the Board became deadlocked. It is apparent that the plaintiff had the backing of his union in the voting, and thereby obtained the further benefit of the referee. Finally, as was implicit in this Court's remand order of May 4, 1976, the Court does not share plaintiff's suspicion of the Board's impartiality in a hearing where the union has refused to represent the plaintiff. Neither does the Supreme Court, for as it stated in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), "an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved." *Id.* at 196. Here, the union breach was never even established, and the plaintiff, for reasons stated in the May 4, 1976 order, received another hearing. Thus, plaintiff cannot now complain that the very relief he requested was inherently unfair, especially where he has neither alleged nor shown any particular facts to support his bias allegation. *See, Del Casal* v. *Eastern Air Lines*, 634 F.2d 295 (5th Cir. 1981), *reh. denied*, 638 F.2d 1234 (5th Cir. 1981).

Plaintiff complains, too, of litigation related activity engaged in by the union after May 4, 1976, including taking depositions of witnesses and disclosing information obtained from plaintiff. In the Court's opinion, these allegations are not even actionable. The union was defending itself in the lawsuit in which,

as noted above, the potential exposure was $600,000. Moreover, the union, of necessity, needed depositions of witnesses before they became unavailable, through death or otherwise. These allegations are, in essence, as BRAC points out, tantamount to alleging that defending a lawsuit is a breach of the duty of fair representation, regardless of the merits of the claim and the good faith of the union. Such a position is untenable. *See, Vaca, supra,* 386 U.S. at 193. Accordingly, since there is no disputed issue of material fact, and plaintiff has failed to controvert in any way the affidavit and letters establishing union good faith, summary judgment for the union is proper on these counts.

C. The Motion for Summary Judgment of the C&EI on Counts II, III, IV and V of the First Amended Petition

As noted in section II above, the C&EI has also sought summary judgment on Counts II through V of the First Amended Petition, maintaining without elaboration that, if it prevails on Count I, the remaining counts must be dismissed. The C&EI has, of course, prevailed on Count I.

In *Vaca* v. *Sipes,* 386 U.S. 171, 186 (1967), the Supreme Court held that "the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." 386 U.S. at 186. In *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.s. 554 (1976), the high court held that if employees can prove an erroneous discharge by the employer and the union's breach of duty of fair representation tainting the arbitration committee's decision, they are entitled to an appropriate remedy against the employer as well as the union. There is authority extending the rule of *Vaca* from the National Labor Relations Act context to that of the Railway Labor Act. *See, Schum* v. *South Buffalo Ry.,* 496 F.2d 328 (2d Cir. 1974); *see also, Hennebury* v. *Transport Workers,* 485 F.Supp. 1319

(D. Mass. 1980) (exhaustion requirement no defense to action against employer when wrongful union conduct is alleged to have caused employee to fail to process his grievance); *Pratt* v. *United Air Lines*, 468 F.Supp. 508 (N.D. Cal. 1978).

Assuming the action for wrongful discharge and wrongful disqualification lies against the employer under the Railway Labor Act when the union has allegedly violated its duty of fair representation, it cannot possibly succeed here. First, since the union has prevailed upon its Motion for Summary Judgment, the union breached no duty preventing plaintiff from adjudicaiton of his underlying grievance. Second, and more importantly, plaintiff has had his underlying grievances adjudicated by the Board. Thus, the C&EI is correct in arguing that the remaining counts must fail. With respect to the claims for deprivation of third party beneficiary rights, the Court is aware of no authority supporting this novel theory. At any rate, plaintiff could hardly be third party beneficiary to a contract to which he is a party.

VI. Conclusion

In accordance with the above discussion, plaintiff's Motion (to file additional counts to supplemental petition) is hereby GRANTED: defendant BRAC's Motion for Summary Judgment is hereby GRANTED on all counts of both the First Amended Petition and the Amended Supplemental Petition, with the exception of Count I of each, and defendant C&EI's Motion for Summary Judgment is hereby GRANTED on all counts of both petitions. The action is hereby DISMISSED, and the Clerk shall enter judgments in defendants' favors.

Since the above disposes of the case in all respects, BRAC's Motion to Dismiss the Amended, Supplemental Petition is DENIED as moot.

IT IS SO ORDERED.

DATED: March 10, 1982

James L. Foreman
Chief Judge

APPENDIX E

STATEMENT OF FACTS

FACTS SUPPORTING PETERSON'S RIGHT TO TRIAL BY JURY AGAINST RAILROAD AND UNION

-A-

Railroad's Disqualification Of Peterson

The Railroad's action disqualifying Peterson followed immediately in the wake of a highly critical letter about Peterson from R.O. Cable, Railroad Telegrapher at Chicago Heights Office, to D. E. Lyons, Assistant Personnel Director of Railroad, dated December 23, 1964. The letter accused Peterson of not sending messages promptly and particularly complaining about the prior day, December 22 (A 147-149). The decision was made by Railroad Officials in Chicago Heights to immediately remove and disqualify Peterson from his first shift position at Wansford Yard without his knowledge or presence (A 67, 112, 113, 147-149, Lyons deposition P. 49-52, 192). These officials included Lyons, Chief Rules Examiner Q. D. Pickering, and Assistant General Chairman John T. Warren, with no union representative present (Q. D. Pickering deposition P. 12, filed December 31, 1975).

No steps had been taken before December 23, 1964, to disqualify him from his position (Asst. Gen. Mgr. John T. Warren depo. P. 329-330), nor was there any discussion with Chief Dispatcher C. E. Dowdy, who was Peterson's and Cable's Supervisor. He knew nothing of the decision until contacted by Lyons, who instructed him to notify Peterson (A 77, 78, 112, 113). Peterson had never been given a letter of warning, and his first knowledge that he was being disqualified was December 23, 1964, when Dowdy informed him (A 112).

George J. Nixon, Jr., Director of Research for the American Train Dispatchers Association, a witness at the second Board hearing in September, 1978, testified he knew both Peterson and Cable and was familiar with the Railroad's Chicago GO Telegraph Yard and the Office at Wansford Yard, he having worked for the C&EI Railroad as a telegrapher and in other capacities from 1945 to 1972. He stated that Cable had no supervisory authority over Peterson, the two being co-equal employees of the C&EI Railroad, and that C. E. Dowdy, Chief Dispatcher, was the immediate supervisor over both of them. With reference to Peterson, he stated that he was a competent telegraph operator, was cooperative to work with, and that he experienced no difficulty in sending and receiving telegraph messages from and to him (A 193).

With reference to Cable, he stated that Cable insisted that the telegraphers in the Chicago GO Office continually prod operators in other telegraph offices along the line to immediately transmit anticipated reports and consists, regardless of the work load and other duties of the operators (A194).

Nixon also described the respective duties of Cable at the Chicago GO Office and Peterson at Wansford Yard.

The only duties of Cable and the other telegraphers assigned to the GO Telegraph Office in Chicago were to send and receive messages by telegraph. Peterson and the telegraph operators at Wansford had many other duties, including working with two Trains Dispatchers on the telephone, operating a small CTC Board, working with various C&EI and other Railroad employees on the telephone, contacting trains and yard engines by radio at the request of yardmasters and Train Dispatchers, and others, handling the switch-board connecting calling parties to other lines; handing train orders received from Train Dispatchers to trains passing Wansford, telegraphic transmission of detailed reports on freight trains and loads and sending by telegraph numerous other messages and reports of various kinds to not only the GO Office in Chicago but other offices on the line (A 194, 195).

Sometime after Peterson had commenced working at Wansford Yard, Railroad reduced the operations at the GO Office in Chicago from three shifts to one shift. This caused complications for the reason that all messages accumulated over 24 hours at Evansville had to be sent to Chicago on the first shift. Moreover, inasmuch as there was no uniformity in the running of trains, every day was different and it was necessary for Peterson to get the messages to Chicago between the rest of the work he had to do (A 99, 100). The problem created by the system was that messages were sometimes delayed due to interruptions caused by the multiple duties required at Wansford and the cutting down of the shifts and personnel at the GO Office (A 99-107).

Peterson attempted to acquaint Railroad Management with the problems and the impossibility of telegraphing to Chicago steadily (A 102, 103). Cable also recognized the deficiency in the system. He protested to the Railroad Officials when the services and personnel in the Chicago GO Office was curtailed (Cable Deposition P. 107-133) (A 74-75). He felt he did not have enough telegraphers (Cable deposition P. 110) (A 75, 76).

The system remained unchanged with one attempted solution by Railroad Management through Q. D. Pickering, Chief Train Rules Examiner, that consisted of a suggested plan to establish a quiet period at Wansford during which Peterson was not to be disturbed by anyone for 2 or 3 hours each day so that he could send messages to Chicago without interruption. Such was an impractical suggestion and would have complicated rather than solved the problems. Each day was different with respect to the demands on the time of Peterson required by his other duties and by the irregularity in the running of the trains (A 110, 111). The demands and insistance of Cable that Peterson telegraph with Chicago when Cable desired without regard to Peterson's other duties added to the problems (A 101-109). On one occasion, in the middle of the year of 1964, Peterson was contacted by Assistant to General Manager, R. H. Spicer, who requested

Peterson to keep a record when and why he could not work with Chicago, but no one looked at the record (A 109). At that time Peterson informed Spicer he was having trouble trying to get them to receive him and also informed him that he could not send when he was doing something else, but would do so as soon as he possibly could (A 109). On another occasion, when Trainmaster at Wansford, J. F. Jett, informed Peterson of Cable's complaints, Peteron inquired as to which of his duties should deserve priority, but received no response from Railroad management (A 108). On yet another occasion, while speaking with Assistant General Manager John Warren as to a message delay, Peterson informed him that the message had not yet been filed with him for sending but that even so, the work he was then doing would prevent the prompt sending of it, to which Warren responded, "What do they think you are down there Pete" (A 106, 107).

During the 4 years that Peterson performed the 1st shift position at Wansford, Warren visited Wansford 3 or 4 times a year and saw Peterson on each visit and observed nothing that would cause a disqualification (Warren deposition P. 130, 131, filed December 10, 1975). Cable had complained about Peterson to Warren in December 1964 (Warren deposition P. 113), and it was not until he spoke with Lyons on December 23, 1964, that Warren decided to disqualify Peterson (Warren deposition Pages 178, 198, 329, 330).

On December 22, 1964, the date complained of by Cable in December 23rd letter to Lyons (A 67, 147), wire trouble had prevented Peterson from sending messages to Cable (A 68, 69, 145, 146).

After being notified of the disqualification action and before the scheduled hearing on January 4, 1965, Peterson, at the suggestion of Union, attended a meeting with Railroad Management in Chicago Heights on January 5, 1964. Participating in the meeting for Railroad were Lyons, Pickering and Warren (A

114). At this meeting, he was given a letter agreement to sign prepared by Railroad, which imposed upon him unacceptable conditions, including the provision that: "If your subsequent performance disproves our belief that you can by properly applying your talents fulfill the duties and responsibilities of the position in question, you will automatically be disqualified therefrom...." (A 5, 116, 117, 154).

Peterson declined to sign the letter agreement, which was subsequently modified by Railroad to provide that he had 30 working days after resuming work to qualify for the position (A 120-125, 156, Exhibit 18). Assistant Personnel Director, D. E. Lyons, testified on deposition that the signing of such letter would constitute an admission of guilt as a matter of record for subsequent referral (Lyons Deposition P. 360, filed December 10, 1975). Chief Train Dispatcher Rules Examiner, Q. D. Pickering, testified on deposition that the letter contained no guarantee of a hearing (Pickering Deposition P. 117, Filed December 31, 1975).

The hearing on disqualification was held January 11, 1965, at Chicago Heights. Peterson, represented by Union, testified at length concerning his duties and the difficulty caused by Cable (A 131-140).

At the conclusion of the hearing, General Chairman Hayes for Union summed up in support of Peterson (A 141, 142), including the following statements:

> "Peterson was suspended from work on December 23rd, two days before the Christmas Holidays, without any warning or reason, presumably account the Piggyback consist was not transmitted promptly that day. Yet; as Peterson informed Mr. Cable, he could not send it until the Lineman completed repairs to the equipment. So, he was suspended from his position and declared unqualified even though he was not at fault.

"Mr. Peterson has been an employee of this railroad for nearly twenty years. Needless, to say, Peterson was shocked by the notice that he was disqualified, knowing that he hadn't done anything to merit it. It was at his representative's suggestion that he went to Chicago Heights on Januar[illegible]h, to ascertain what the trouble was and to try and se[illegible]t couldn't be disposed of. However, as a condition of his return to his assignment, he was presented with an affidavit to sign that not only would have admitted he was guilty of some wrongdoing, but would have permanently disqualified him for any reason, even one over which he had no control. He did not sign the affidavit as any reasonable intelligent person would refuse to do.

"Therefore, by the carrier's action in suspending him from work two days before Christmas for something over which he had no control, and without endeavoring to ascertain why the consist was not sent promptly on December 22, and by not permitting him to resume work after being apprised of the facts without his signing a binding affidavit, we can only conclude that without question, there is prejudice against him.

"It is, therefore, the position of the Employees that the carrier is not only in violation of the discipline rule when it suspended him without a hearing under the disguise of disqualification, but violated the suspension from work rule; the Guarantee rule; the seniority rule, as well as related rules, and is liable for wages lost and penalties for each day that he is held off his rightfully owned assignment." (A 141, 142) (Amended Supplemental Petition Exhibit "M", A 44).

This hearing was held under the provisions of the Collective Bargaining Agreement (Exhibit M, A 44) and resolved by Railroad against Peterson, who was advised of same on January 15, 1965, by the Hearing Officer, C. E. Dowdy (Exhibit J-9,

Record Vol. II, Document 80). Although D. E. Lyons was not present at the January 11th hearing, he participated after the hearing in determining what should be done and then drafted the decision for Dowdy to sign. He then, as the highest designated officer of the Railroad under the terms of the Collective Bargaining Agreement, heard Peterson's appeal submitted by Hayes and denied it on February 16, 1965. This was the final decision of the Railroad on the disqualification of Peterson (A 157-159, Exhibit J-19, Record Vol. II, Document 80, Lyons deposition P. 206-211).

The witness, Robert V. Burkhart, Local Chairman of Union, testified that the Collective Bargaining Agreement provided for impartial hearings and impartial appeals from the first hearing by an impartial examination of the record by another person. It was never the Union's belief that the agreement should allow merely a rubber stamping of management's first impression by the second hearing level. As Local Chairman of the Union, he would expect the next level to pass on it independently (Burkhart deposition P. 165-168, filed November 2, 1977).

B.

Railroad's Dismissal Of Peterson

After the disqualification hearing of January 11, 1965, at Chicago Heights, Peterson returned to Evansville arriving on Train No. 1 on January 12th at 2:00 a.m. He received a call to go to Wansford that night on the third shift but did not feel up to it and so advised Lawrence Pape, Railroad Clerk of the Chief Dispatcher's Office, that he had been under terrific strain and was sick and unable to work that night (A 48, 125, 126, Employee's Ex Parte Submission, page 14, Record of Proceedings before the National Railroad Adjustment Board, Document 92 of the Court Record, p. 29).

Peterson next received a letter from C. E. Dowdy, Chief Dispatcher, dated February 1, 1975, asking him to report for

duty before February 5, 1965, but giving no directions of where to report or what duty to perform (A 126).

He also received a telephone call from Q. D. Pickering on February 1, 1965, advising that Burkhart had bid in Peterson's first shift position and that Peterson could bid in the Wansford third shift position, to which Peterson replied he was not interested (A 126).

Lyons, on his deposition, admitted that there was no rule that required a man of higher seniority to bid in a job over a man of less seniority. He also admitted that aftger Peterson's first shift position had been filled by Burkhart, even in the absence of Burkhart, Peterson would not have been permitted by Railroad Management to have taken the position due to the action of Railroad is disqualifying him from the first shift. He further admitted he knew of no telegrapher's job open between February 1 and February 5, 1965, nor between February 5 and the date of Peterson's discharge in April 1965 (Lyons Deposition P. 234-249) (A 49).

The dismissal hearing was held on April 9 at Danville, Illinois conducted by Q. D. Pickering on the issue of Railroad's contention that Peterson failed to report to work as instructed (Transcript of hearing, Exhibit PWP-11, attached to Employee's Ex Parte Submission, Document 92 of the Court Record, pages 175-183).

Burkhart, as local Union Chariman, appeared on behalf of Peterson at the hearing and was told by Peterson that he felt he was entitled to the first shift position at Wansford because he had been wrongfully disqualified (Burkhart Deposition P. 178-180).

Burkhart testified on deposition that in Union parlance, the words, "He owns the job" has significance in that it means through seniority, he has acquired the right above anyone else to perform the job as long as he is not sick and unable to per-

form it, he is entitled to remain in that job until he is properly removed from the position through exhausting of all procedures (Burkhart deposition P. 170-172).

He also testified that since the disqualification hearing of January 11, 1965, Peterson appeared to be in bad shape physically and in his opinion, he did not think Peterson was well (Burkhart deposition P. 230, 231).

Peterson, at the dismissal hearing of April 9, testified that he was sick, although not under a doctor's care and not physically sick, but sick at heart (Exhibit PWP-11, Employee's Ex Parte Submission, Document 92 of Court Record, pages 175-183). At the same hearing, Peterson's daughter, Jeniel Peterson, testified that although she was not a qualified doctor, she felt qualified to say that since December 23rd, her father was unable to think with a clear mind or to work for any company (Exhibit PWP-11, Employee's Ex Parte Submission, Document 92 of Court Record, pages 175-183) (Pages 63-66 of Ex Parte Submission, attachment to Motion for New Trial, Document 116, Vol. IV).

Peterson, toward the conclusion of the hearing, testified, "As far as I am concerned, the Wansford end was never at any time checked out. It is any man's inherent right to have his side of the story thoroughly checked out. That is no more than simple justice. That is all I ever wanted." (Exhibit PWP-11, Employee's Ex Parte Submission, Doc92 of Court Record, pages 175-183).

Pickering, the Railroad Hearing Officer, later testified by deposition that even if he had known of the difficulty Peterson was having on December 22, 1964, as testified to by Peterson on disqualification hearing, he would have disqualified him without discussing the matter with Peterson (Pickering Deposition P. 185-186).

The dismissal of Peterson followed the April 9 Pickering-conducted hearing on April 15, which was during the 9-month appeal period (A 6), while Peterson was engaged in correspondence with his Union pertaining to an appeal of Railroad's disqualification action (A 161, 165-168).

The dismissal decision executed by C. E. Dowdy was written by Lyons, as was the decision on the subsequent appeals of the dismissal action, which appeals were taken by Hayes on behalf of Peterson to Warren, and finally to H. S. Vierling, General Chariman of the Railroad (Lyons deposition P. 240-247, Employee's Ex Parte Submission pgs. 58-62, Document 92, Memorandum in Opposition to Motion for Summary Judgment, attached to Motion for New Trial, Record Vol. IV, Document 116).

Hayes, in his appeal to Dowdy, Warren and Vierling, reitereated Union's position on behalf of Peterson that, "It is the position of the employees that Peterson's dismissal for charges 'failure to report for work', is not only unreasonable and harsh, but all out of proportion even if he had no legitimate reasons for not working. We maintain that he himself can determine his fitness for work, and the fact that during his twenty years of service he was never disciplined for the same cause, is evidence of his willingness to work when he is well." (A 174)

In Hayes' letter of August 18, 1965, to Lyons, it is stated:

> "...we maintain that this is a bonafide claim progressed for submission to the Adjustment Board;..." (A 175)

Hayes' letter of October 26, 1965, to Vierling, stated:

> "...this is to advise that we cannot accept your declination of this claim, and are forwarding it to the office of the President of our Organization for further handling." (A 180)

General Manager Vierling denied the appeal August 10, 1965 (Exhibit J-39, Record Vol. II, Document 80).

C.

Union Representation Of Peterson On Railroad Property

General Chairman Hayes, on January 2, 1965, agreed to represent Peterson at the disqualification hearing which was then scheduled for January 4. On January 3, he told Peterson that the Railroad officials said they thought the matter could be worked out with a friendly discussion in Chicago, which Peterson attended with the results heretofore described (Brief Page 13). Hayes did not attend the meeting (A 113, 114).

On January 2, Peterson sent Hayes a fourteen-page letter setting forth the background and facts (A 117-119).

On January 5, 1965, Hayes and Peterson conferred by telephone concerning the agreement the Railroad had tendered to Peterson for signature. Hayes informed Peterson that he had raked Warren over the coals for expecting Peterson to sign such an agreement (A 120). On January 7, during a further discussion of the agreement, Hayes never told Peterson that he should agree to the settlement (A 125).

On January 11, Peterson met Hayes prior to the hearing in Chicago Heights and gave him the fourteen page summary made on January 2nd. Hayes had no discussion with him before the hearing. At the hearing, Peterson told Hayes he had records from different days showing what had been going on. Hayes did not call for any of the records (A 125).

After the hearing, Hayes told Peterson he thought he had a fifty-fifty case (A 129). He told him that he had a pretty good case and that these things are long, drawn out affairs and it would probably be a year or two before he heard anything. There was no discussion at that time as to whether or not Peterson should sign the agreement (A 125).

Hayes never told Peterson he would be required to protect his seniority (A 127).

On February 18, 1965, Peterson wrote Hayes advising him he wanted his case appealed and offered his assistance in any way possible to show how Cable operated. He suggested affidavits from various operators up and down the line that knew of Cable's method of operation (A 161).

On February 23, 1965, Hayes advised that his appeal to Lyons had been denied on February 16, 1965, and that "in the meantime I am preparing the case for submission to the Adjustment Board, as I feel it is extremely unlikely that any settlement can be reached." and advised that "When your case is submitted to the Adjustment Board, there isn't anything else I can do until a decision is rendered." and that in these cases "the Board's main concern is if the employee had a fair and impartial hearing." He further advised that, "Unless you hear otherwise from me, you can assume the case has been submitted to the Adjustment Board, and it will be from one to two years before a decision is rendered." (A 165)

On March 3, 1965, Hayes wrote Lyons regarding Peterson, stating:

> "...Since there was no evidence submitted that he refused to perform the work without any reason, it is a natural assumption that any delays in performing preferential work was account of insufficient time or because the wires were inoperative. We cannot accept the notion than an employee, who has worked a job for some four years, suddenly becomes disqualified except by physical handicap.
>
> "...Trainmaster Jett admitted at the hearing that he didn't know anything about what work has to be performed first, and also testified that Peterson's explanations were satisfactory to him. Therefore, since Mr. Jett was satisfied that any delays in sending consists, etc., was caused by Mr. Peterson doing other preferential work indicates that Peterson's work was satisfactory.

* * *

"In connection with the agreement offered Peterson as a condition to permit him to return to his position any modificaitons in the original agreement proposed, is immaterial. In any event, it would have committed him to admitting guilt of some wrongdoing which he emphatically denies, and we maintain that there was no evidence submitted to prove him guilty of any offense.

"...this is to advise that we are forwarding the claim to the President of our Organization for further handling...." (A 167)

The disqualification claim was then forwarded by Hayes to G. E. Leighty, President of the Union, for consideration "and appeal to the Adjustment Board if found to have sufficient merit." (A 166-168).

On May 5, 1965 Leighty wrote Hayes and directed him to attempt settlement on the property (A 171).

On May 3, Hayes wrote Peterson inquiring whether he would be willing to go back on a leniency basis if the company would give it consideration (A 169).

Peterson, in letter of May 6 to Hayes, advised Hayes that he wanted the best appeal possible. Peterson heard from Hayes on May 14th inquiring whether he would be willing to sign the original conditional agreement (A 173). He testified that Hayes never asked him to sign the original agreement until after he was dismissed (A 128).

On September 7, Peterson wrote to Leighty advising that he felt Hayes did not intend to proceed with his case and that he therefore felt it necessary to confer with Leighty direct in seeking to have his case appealed. He advised Leighty there were many facts to his case that Leighty would want to know, and in order to acquaint him with them, a personal conference would be mutually beneficial (A 176, 177).

Leighty replied to Peterson on September 10, 1965, advising that Hayes anticipated a conference with Railroad for further discussion sometime after the 1st of October and further stated:

> "You also stated in your letter that General Chairman Hayes does not appear to have the slightest intention of progressing your case to an appeal board. I presume you mean by the board to be the Third Division of the National Railroad Adjustment Board. This is to advise you, Brother Peterson, that if General Chairman Hayes is unable to settle your case on the Division, it is his intention to submit it to this office for further handling. The decision to progress your case to the Third Division will be made by this office, based upon the facts and circumstances involved in the matter itself." (A 178, 179)

He concluded by stating:

> "It is your opinion that a personal conference with me would be mutually beneficial. Let me say to you, Brother Peterson, you are quite welcome to come to headquarters at any time to discuss your case with me or a member of my staff should I not be available." (A 178, 179)

On October 12, 1965, Peterson went to the Union Office in St. Louis, Missouri. He could not see Leighty but talked to Mr. Dysert, a Union Official at the Union Office, and left three copies of the account of the events in Leighty's Office with Dysert. This was a resume of facts prepared January 2, 1965 for Hayes. Peterson informed Dysert that he was interested in his case being appealed and wanted to know if the Union was with him, and if not, he would take the appeal in person. He asked that he be advised, but heard nothing from him (A 128, 129).

On October 26, 1965, Hayes wrote Railroad General Manager Vierling that the claim was being forwarded to the Office of the President of the Union for further handling (A 180), and on November 4, 1965, Leighty wrote Hayes acknowledging receipt

of his file and that the case would be handled as promptly as possible (A 181).

Peterson heard nothing until January 28, 1966, when he received the letter from Hayes advising that the Union would no longer process his grievance and therefore, Peterson could individually submit the grievance to the Third Division of the National Railroad Adjustment Board within the applicable time limit, which would expire May 10, 1966 (A 184). In Leighty's letter to Hayes, January 26, 1966, advising that Union would not appeal to the Board, he stated:

> "For reasons known only by Brother Peterson, he has refused to return to work on his regular assignment and has also refused to assume his obligation as an extra employee." (A 182, 183)

Peterson replied to Hayes on March 10 advising that since the Union left him no choice, he would handle the claim himself (A 185). Hayes then, on March 14, 1966, advising Peterson that the correct time limit for appealing his case expired May 8, 1966 (A 186). Unknown to Peterson, the time limit for such appeal had already expired on November 16, 1965, while his case was still being handled by Union (A 6).

Peterson, on May 5, 1966, without Union assistance, appealed both of his claims to the Board (A 184-186), which on October 31, 1967, entered its Award No. 15924 dismissing the disqualification claim for failure to file within the nine month time limit, and denying the claim for wrongful dismissal (A 5-6). Peterson, having exhausted all other remedies, filed suit in the U. S. District Court on July 11, 1968, to review the Board's action and on April 23, 1969, filed additional counts against the Railroad and Union (Record Vol. I, Documents 16-18).

D.

Union's Actions Following Dismissal Of Peterson's Appeal For Non-Filing Within Nine Months Limitation

After Union had taken affirmative action before the U. S. District Court with success in aligning Union as Plaintiff with Peterson on Count I of the First Amended Petition reviewing Board award, the Court remanded the case to the Board for new hearing. Union then refused to appear for and represent Peterson before the Board at the new hearing, although requested by Peterson to do so (A 30, 31, 36).

During the Union's questioning of D. E. Lyons, Assistant Personnel Director of Railroad, counsel for Union stated into the record, with reference to Peterson: "Indeed if you are going to sue for wrongful discharge, I hardly know how else Carrier can argue to the response other than with the testimony of the man who made the decision." (Lyons Deposition P. 43), and later stated into the record that a man must "Obey first, grieve second." (Lyons deposition P. 139)

During the cross-examination of Lyons, counsel for Union attempted to assist the witness in answering the question propounded by counsel for Peterson (Lyons Deposition P. 239).

Later, Union counsel asked if it wasn't possible for Railroad to have discharged Peterson for insubordination rather than simply disqualifying him. Counsel for Peterson objected and stated into the record that, "The Union finds themselves in an ambivalent position on having taken strong positions against this monstrous injustice that was done to this man at the time that they were representing him. And now, apparently seeking to damage the man's case while purporting to realign themselves as plaintiff..." (Lyons deposition P. 330).

During Union's examination of Robert V. Burkhart, Local Chairman of Union, on his deposition, counsel for Union inquired if he was aware of customs and practices existing on the

C&EI Railroad with respect to "so-called protection of extra work assignments by telegraphers." Objection to this question was made by counsel for Peterson, including the following:

> "...The Union, having identified themselves with Peterson as a Co-Petitioner in that claim seeking to take the case back to the Board, has then in that position now adopted an adversary position to Peterson while purporting to the Court to represent the same position of Peterson, that is, to go back to the Board for a hearing on the merits, and now taking a position, which I presume they hope would prevail, that Peterson would be denied in the Board hearing any relief on the ground that custom and practice might have something to do with whether he's in the status of an employee or not. And, therefore, are using their position in this case as Co-Petitioner in a manner that is designed to prejudice the position of Paul W. Peterson..." (Burkhart deposition P. 95-101)

During Peterson's cross examination of Burkhart, counsel for Union attempted to prevent disclosure for use in cross examination of a discoverable written memorandum in the possession of Burkhart containing Burkhart's conversation with counsel for Union, Alan B. Hoffman, prior to his testifying on deposition (Burkhart Depostion P. 219-291). After the Memorandum was finally produced, the following questioning took place:

> Q: And didn't you tell Mr. Hoffman at that time—and Mr. Hoffman is the attorney appearing on behalf of the union—with regard to the Petitioner, "It was unheard of for someone to be taken off the job in this fashion?
>
> A: Let me see that. Yes, I used those words.
>
> Q: That was with regard to the disqualification of Peterson?
>
> A: Yes. (Burkhart deposition P. 228)

* * *

Q: Now, at the time of your conversation with Mr. Hoffman, did you tell him that after the disqualification hearing January 11, 1965, that "by this time Peterson did seem to be in bad shape physically."?

A: That was my opinion. (Burkhart Deposition P. 230)

Also, he admitted that on the second page of the memorandum, he stated to Mr. Hoffman that there were two telegraph wires to Chicago from Wansford, one was down about 10% of the time and the other was down about 40% of the time and that on occasion, there were outages for a few hours at a time (Burkhart deposition P. 228, 229).

Union's statement at Page 20 of its Memorandum filed herein, to-wit, "The proximate cause of his disqualification from the first shift telegrapher position was his failure to send certain reports to the Carrier's Chicago Office on December 22, 1965.", which represents a complete change from its position stated by M. J. Hayes, Union General Chairman, on the premises (Record Vol. III, Document 104) (A 141, 142, 158).

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-1864

Daniel K. Graf,
Plaintiff-Appellant,

v.

Elgin, Joliet And Eastern Railway Company, and
Brotherhood Of Railway Carmen, Local No. 882,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 79 C 2466—John F. Grady, *Judge.*

Argued November 4, 1982—Decided January 7, 1983

Before WOOD, ESCHBACH, and POSNER, *Circuit Judges.*

POSNER, *Circuit Judge.* We consider in this appeal issues of federal jurisdiction and labor law arising out of the attempt of a railroad worker, Daniel Graf, to sue his union, a local union of the Brotherhood of Railway Carmen, and his employer, the Elgin, Joliet and Eastern Railway.

Graf sustained a concussion in an accident at work. In the course of investigating the accident the railroad learned that when Graf had been hired two years earlier he had not disclosed on his employment and medical forms a previous job, an injury

(to his knee) in that job, and a claim for compensation for that injury. All were items of information that the forms required him to disclose, on penalty of being fired if he did not. After an informal hearing before his supervisor, at which Graf was represented by Leo Evans, the chairman of Local 882 (the collective bargaining representative), the railroad fired Graf for having knowlingly falsified the forms.

The grievance procedure under the collective bargaining agreement entitled Graf to appeal to his supervisor's boss within 60 days, and thereafter to higher levels in the company and eventually to the arbitration boards created by the Railway Labor Act, see 45 U.S.C. § 153. Graf asked Evans to file an appeal for him and Evans said he would, and later that he had. These appeals customarily are handwritten and hand delivered. Evans wrote out the following appeal: "Please consider this as a appeal to your dission...[terminating Graf]. I can't except your dission and therefore appeal to the next highest officer of the carrier. We ask that he be reinstated with seniority in tack and all back wages." Evans put this appeal in his pocket together with several others, only to find after the 60 days were up that it was still there. He testified in his deposition that the failure to submit Graf's appeal with the other appeals had been inadvertent. Graf in his deposition testified that Evans had told him, "I am sorry. I really thought I put it in."

Graf filed suit in a state court against the company (Count I) and the union (Count II). Count I, which sought reinstatement and back pay, charged that the company had fired Graf for the sole and wrongful reason that Graf had sued it under the Federal Employers Liability Act, 45 U.S.C. §§ 51 *et seq.*, for damages allegedly sustained as a result of the accident. Count II, which sought damages of $15,000, charged that the union had negligently failed to prosecute Graf's grievance. This count originally named Evans as a codefendant but he has been dismissed from the case and Graf does not appeal the dismissal.

The union removed the suit to federal district court and moved for summary judgment. The district judge granted the motion and dismissed Count II on the ground that the union had not breached its duty of fair representation. The judge then dismissed Count I on his own initiative because breach of the union's duty is a precondition to maintaining a suit against the company.

Graf's state court complaint had not indicated under what law he was suing, and in removing the suit the union did not indicate why it thought Graf's complaint was within the original jurisdiction of the federal district court. After removal Graf filed an amended complaint in the district court, but it was virtually identical to the original one and likewise did not indicate the legal basis for the suit. The district court never stated what it thought the basis of federal jurisdiction was either.

There is a natural assumption, based on section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, that all suits to enforce collective bargaining agreements (including suits by individual workers, see *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962)) are within the original jurisdiction of the federal district courts and hence removable under 28 U.S.C. § 1441 if filed in state court. And Graf's state court complaint, at least if read very liberally, alleges that the union violated its duty of representation under the collective bargaining agreement and that the company violated the agreement by firing him. But section 301 does not apply tomployers subject to the Railway Labor Act (see sections 2(2), 2(3) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 152(2), (3), and section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a)), as the employer in this case is conceded to be; and no other statute purports to give the federal courts jurisdiction to enforce collective bargaining agreements with such employers. It is true that awards and denials of awards by arbitral boards created by the Railway Labor Act are reviewable in federal district court, 45 U.S.C. §§ 153 First (p), (q), 153 Second, but Graf is not seeking judicial review of the denial of an award.

If the complaint can be read to allege a violation of the Railway Labor Act itself rather than just of the collective bargaining agreement, then 28 U.S.C. § 1337 confers orginal federal jurisdiction. See, e.g., *Raus* v. *Brotherhood of Railway Carmen,* 663 F.2d 791, 796 (8th Cir. 1981). *Steele* v. *Louisville & Nashville R.R.,* 323 U.S. 192, 199, 204 (1944), held that the Railway Labor Act imposes on the collective bargaining representative a duty independent of the terms of the agreement to represent all members of the bargaining unit fairly. Count II can be read to allege a breach of that duty, and therefore 28 U.S.C. § 1337 does confer federal jurisdiction over this count.

The basis of federal jurisdiction over Count I, which alleges retaliatory discharge by the railroad, is less clear. There is no suggestion that the company participated in the union's alleged violation of the statutory duty of fair representation; if it had, the basis of jurisdiction would be the same as over Count II. A claim that you have been retaliated against for exercising a federal right—the right to sue under FELA—might raise a federal question substantial enough to confer federal jurisdiction under 28 U.S.C. § 1331. It is unclear, though, what federal law such retaliation would violate. Apparently it would not violate the FELA itself, see *Greenwood* v. *Atchison, Topeka & Santa Fe Ry.,* 129 F.Supp. 105, 107 (S.D. Cal. 1955); *Loucks* v. *Star City Glass Co.,* 551 F.2d 745, 749 (7th Cir. 1977), or federal labor law, cf. *Krispy Kreme Doughnut Corp.* v. *NLRB,* 635 F.2d 304 (4th Cir. 1980). Although the fact that a federal claim is without merit will not defeat federal jurisdiction unless the claim is frivolous, *Bell* v. *Hood,* 327 U.S. 678 (1946), this observation has only limited relevance to the question at hand, which is whether there is any federal jurisdictional peg on which Graf can hang a claim that the company violated the collective bargaining contract. A claim of retaliatory discharge having no basis in federal law would be dismissed before trial and any pendent state law claims would be dismissed along with it. *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 726 (1966).

Diversity of citizenship was the ground on which a federal district court assumed jurisdiction over an employee's suit against his employer for breach of the collective bargaining contract in *Moore* v. *Illinois Central R.R.*, 312 U.S. 630, 632 (1941) (see dissenting opinion in the court of appeals, *Illinois Cent. R. Co.* v. *Moore*, 112 F.2d 959, 967 (5th Cir. 1940)), but diversity is not alleged here and appears not to be present. Moreover, *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320 (1972), in overruling *Moore*, held that the arbitral remedies provided by the Railway Labor Act are exclusive and extinguish any remedies under state law. Maybe, though, the following can be argued: if, as alleged in the present case, the union, by violating its duty of fair representation, prevents the worker from taking advantage of the remedies set up by the Act, his rights under state law survive because Congress would not have wanted to leave him completely without remedy. But this way of distinguishing *Andrews* would no solve Graf's jurisdictional problem; he would still have to show how he can bring a suit under state law in federal court if there is no diversity.

Now Graf, as we shall see, may not be able to get complete relief in his suit against the union. Complete relief may require bringing in the company as an additional defendant. If so, Rule 19 of the Federal Rules of Civil Procedure would authorize joinder. But Rule 19 is not a source of federal subject-matter jurisdiction, 3A Moore's Federal Practice § 19.04(2.-2) at pp. 19-68 to 19-70 (1982). And although the same considerations that support joinder might appear to support federal jurisdiction over Graf's claim against the company under the "pendent parties" concept, the current judicial hostility to that concept, illustrated by our recent decision in *Hixon* v. *Sherwin-Williams Co.*, 671 F.2d 1005, 1008-09 (7th Cir. 1982), makes this an unpromising avenue, though *Hixon* itself is distinguishable.

Language in *Andrews*, see 406 U.S. at 323, and in *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 692 (1963), suggests a more direct approach: a suit for

breach of a collective bargaining contract arises under the Railway Labor Act, and is therefore within the federal district courts' original jurisdiction under 28 U.S.C. § 1337. See *Goclowski* v. *Penn Central Transport. Co.*, 571 F.2d 747, 752 n. 2 (3d Cir. 1977). But we have misgivings about this approach too. *Andrews* and *Central Airlines* do say that rights of action to enforce collective bargaining agreements arise under the Railway Labor Act, but *Central Airlines* involved a statutory provision applicable only to airlines (45 U.S.C. § 184), while the issue in *Andrews* was not whether a suit on a railroad collective bargaining agreement arises under the Railway Labor Act but whether the arbitral remedies created by the Act preempt suits under state contract law, and the fact that the Act creates a defense to a suit under state law would not make it a suit arising under federal law and hence removable to federal court, see *Illinois* v. *Kerr-McGee Chem. Corp.*, 677 F.2d 571 (7th Cir. 1982).

Nor does the fact that an activity is regulated by a federal statute, as collective bargaining in the railroad industry is regulated by the Railway Labor Act, mean that disputes between private parties engaged in that activity arise under the statute. See *T.B. Harms Co.* v. *Eliscu*, 339 F.2d 823, 827-28 (2d Cir. 1964). For example, the Supreme Court held recently that section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c), which requires transit authorities to protect the interests of affected workers before the authority may receive federal money, does not authorize a union to sue in federal court for alleged violations of the protective arrangements or of the collective bargaining agreement embodying those arrangements. *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 102 S. Ct. 2202 (1982). The Court in *Jackson Transit Authority* did not cite *Andrews;* it distinguished *Central Airlines* by reference to the purpose of the statutory provision involved in that case (and not in this case); and it indicated, as it has in many other recent cases, e.g., *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979), a reluc-

tance to create a private right of action under a federal statute without direct evidence that Congress desired this result. 102 S.Ct. at 2206-07. There is no evidence that the draftsmen of the Railway Labor Act wanted the federal courts to exercise original jurisdiction over contract disputes, as distinct from the very limited review jurisdiction that the Act explicitly gives them over decisions by the arbitral boards. Though *Jackson Transit* does not question the authority of *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957), where the Supreme Court held that section 301 of the Taft-Hartley Act gives the federal courts the power to create a federal common law to govern the interpretation of collective bargaining agreements, there is no counterpart to section 301 for the railroad industry.

Despite all these grounds for doubt we believe that Graf's contract claim against the railroad does arise under federal law—federal common law. Although the Railway Labor Act neither establishes standards for interpreting collective bargaining agreements nor explicitly authorizes the federal courts to establish them, but instead gives responsibility for such interpretation to the arbitral boards, the Act has been construed to create a duty of fair representation, and so construed it sometimes requires the courts to interpret railroad collective bargaining agreements. *Richins* v. *Southern Pac. Co.,* 620 F.2d 761, 763 n. 3 (10th Cir. 1980). Since a union's failure to represent a worker in the grievance process injures him only if his grievance has merit—only if the collective bargaining agreement has been violated—the court, as an essential step in computing damages in any duty of fair representation case, must decide whether the agreement has been violated. it is not to be supposed that the law applied in these decisions is some state's law of labor contracts, especially after *Andrews* held that the Railway Labor Act extinguished state contract remedies for breach of railroad collective bargaining contracts. For this and other reasons there is no well-developed state law on how to interpret such contracts. That makes this case the converse of *Powers* v. *United States Postal Serv.,* 671 F.2d 1041, 1045-46 (7th Cir.

1982), where in holding that state law rather than federal common law governs the interpretation of post office leases we noted that state landlord-tenant law was well developed but a federal common law of landlord-tenant relations had never developed at all.

Since a federal common law of railroad collective bargaining contract interpretation is being applied in workers' suits against unions, it makes sense to apply it also in the worker's suit against his employer. This is obvious enough where, as in *Glover* v. *St. Louis-San Francisco Ry.*, 393 U.S. 324 (1969), the suit charges the union and the company with colluding in violation of the Railway Labor Act to prevent the worker from having his grievance considered under the procedures set up by the collective bargaining agreement. The court has the power to award damages against both the union and the employer for their violation of the Act and correlatively to determine whether the grievance has merit, and federal common law controls this determination. If only the union has violated the Act, but the violation has prevented the worker from using the arbitral system to prosecute his grievance against the company and as a result the worker sues the employer in federal court for breach of the collective bargaining agreement, federal common law should apply to that breach also. Since the court must decide in the remedy phase of the suit against the union whether as a matter of federal common law the collective bargaining contract was breached, how peculiar it would be if the court had to decide the same question under state law (and state law that may not exist) in the suit against the employer arising from the same breach.

Now that the amount in controversy requirement has been abolished in federal question cases, it hardly matters whether this area of federal common law is regarded as a thing apart from the Railway Labor Act, so that federal jurisdiction is conferred by 28 U.S.C. § 1331, or as a part of the Act, so that jurisdiction also lies under section 1337. See *Central Airlines*,

supra, 372 U.S. at 696. Either way, there is, we conclude, federal jurisdiction over Count I. But this conclusion must remain tentative, at least for the moment, because Count I raises another jurisdictional issue: whether, so long as the company is not implicated in the union's violation of the duty of fair representation, the arbitral remedies created by the Railway Labor Act are exclusive and therefore prevent a worker from suing in a federal court for breach of the collective bargaining contract. We postpone consideration of that question because it is bound up with the merits of Count II, the suit against the union—to which we now turn.

In *Hoffman* v. *Lonza, Inc.,* 658 F.2d 519, 523 (7th Cir. 1981), another case where the union "griever" simply forgot to perfect the worker's appeal within the system created by the collective bargaining agreement, a panel of this court held that the duty of fair representation had not been breached. Proof of negligence was not enough; intentional misconduct had to be shown. Graf argues that Evans deliberately failed to forward his appeal and by also failing to tell Graf what he had done (or rather not done) prevented Graf from prosecuting the grievance himself. But Evan's vigorous denial, under oath, of deliberate neglect obliged Graf, if he was to resist summary judgment, to present some evidence in support of his theory, see Fed. R. Civ. P.56(e); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 160 (1970), and he presented none. He was not able to show any motive for Evans' trying to do him in—personal animosity, union politics, or anything else. The form and text of the appeal drafted by Evans indicate, what is anyway plain, that the representation process in grievance matters is informal. Inadvertent omissions to prosecute grievances must be common, and do not imply bad faith.

But Graf also asks us to reexamine the standard adopted in *Hoffman,* and we think we ought to do so. That standard was adopted by a two to one vote with the two judges of this circuit on the panel split. Although two other panels have followed *Hoffman,* see *Rupe* v. *Spector Freight Systems, Inc.,* 679 F.2d

685, 691-92, 694 (7th Cir. 1982); *Cote* v. *Eagle Stores, Inc.*, 688 F.2d 32, 34 (7th Cir. 1982) (per curiam), both were careful to apply in the alternative the slightly less stringent standard of an earlier case in this circuit, *Baldini* v. *Local No. 1095, United Auto Workers*, 581 F.2d 145, 150-51 (7th Cir. 1978), which requires that the worker prove that the union's conduct was "arbitrary." See also *Miller* v. *Gateway Transport Co.*, 616 F.2d 272, 277 nn. 11-12 (7th Cir. 1980). And several other circuits use a *Baldini* rather than a *Hoffman* standard. See, e.g., *Griffin* v. *United Auto Workers*, 469 F.2d 181, 183 (4th Cir. 1972); *Beriault* v. *Local 40, Super Cargoes & Checkers of Int'l Longshoremen's & Warehousemen's Union*, 501 F.2d 258, 263-64 (9th Cir. 1974); *Foust* v. *International Brotherhood of Elec. Workers*, 572 F.2d 710, 715 (10th Cir. 1978); *Farmer* v. *ARA Services, Inc.*, 660 F.2d 1096, 1103 (6th Cir. 1981). The Third Circuit's decision in *Medlin* v. *Boeing Vertol Co.*, 620 F.2d 957, 961 (3d Cir. 1980), however, supports *Hoffman*.

Vaca v. *Sipes*, 386 U.S. 171, 194 (1967), the Supreme Court's fullest discussion of the duty of fair representation, contains a pregnant dictum: "In a case such as this, when [the worker with the grievance] supplied the Union with medical evidence supporting his position, the Union might well have breached its duty had it ignored [his] complaint or had it processed the grievance in a perfunctory manner." The dictum was repeated in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 568-69 (1976), and very recently in this circuit in *United Steelworkers of America* v. *NLRB*, 692 F.2d 1052, 1057 (7th Cir. 1982) (per curiam); but see *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 299 (1971), not cited in *Hines*. The force of the word "perfunctory" is unclear, though. It could just mean refusing—deliberately refusing—to do more than go through the motions. Cf. *Rupe* v. *Spector Freight Systems, Inc.*, *supra*, 679 F.2d at 694; *Ethier* v. *United States Postal Serv.*, 590 F.2d 733, 736 (8th Cir. 1979). But it could also cover a case of sheer forgetfulness such as we have here.

The proper standard cannot be determined by parsing ambiguous dicta, especially when none of the cases we have cited arose under the Railway Labor Act. Though the duty of fair representation is usually assumed to be the same under the different federal labor laws, see, e.g., *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 66 n.2 (1981) (Stewart, J., concurring), we shall see that this assumption overlooks some relevant differences.

Maybe, though, the precise choice of verbal formulas to define the duty of fair representation has little practical significance. The facts in this case are like the facts in *Hoffman*, where the panel, although unable to agree on the proper standard, was unanimous that the union had not breached its duty of fair representation. And *Baldini* is readily distinguishable, as it involved a deliberate rather than inadvertent failure to prosecute the plaintiff's grievance. But there is so much litigation over the duty of fair representation that it seems worthwhile to specify the applicable standard as clearly as possible. We have therefore reexamined *Hoffman*, and having done so we have concluded that its standard is correct, at least for cases arising under the Railway Labor Act.

The standard is as follows. The union has a duty to represent every worker in the bargaining unit fairly but it breaches that duty only if it deliberately and unjustifiably refuses to represent the worker. Negligence, even gross negligence—a much-criticized standard, see, e.g., Prosser, Handbook of the Law of Torts 182 (4th ed. 1971)—is not enough; and, obviously, intentional misconduct may not be inferred from negligence, whether simple or gross. Although extreme recklessness is so close to intentional wrongdoing that the law treats it as the same thing, see, e.g., *United States* v. *McAnally*, 666 F.2d 1116, 1119 (7th Cir. 1981), we need not worry about that refinement in this case; it is clear on which side of the line Evans' failure to dig Graf's appeal out of his pocket falls. The failure to perform a legal duty is negligence, or if the cost of performing it would be much less

than the expected benefits gross negligence, *Conway* v. *O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940), rev'd on other grounds, 312 U.S. 492 (1941); and Evans' action was one or the other. But he was not trying to do in Graf; nor does his lapse of memory signify such a reckless indifference to Graf's interests that it can be called intentional misconduct. And while common sense tells us that the reason Evans was not careful to preserve Graf's appellate rights may have been that he thought the grievance had little merit, this would make Evans at worst somewhat devious. It would not show intentional misconduct. A union is not required to prosecute a grievance that it honestly believes lacks merit. *Vaca* v. *Sipes*, *supra*, 386 U.S. at 192-95. There is no evidence that Evans was acting in bad faith.

The *Hoffman* standard is a narrow one—and properly so, especially in a case under the Railway Labor Act. That Act does not purport to create any private damage remedies against unions at all, and the courts should be cautious in inferring them, cf. *Jackson Transit*, *supra*, 102 S.Ct. at 2206-07; *Touche Ross*, *supra*, 442 U.S. at 568-76. Major provisions of the Act date from 1934, the heyday of pro-union legislation (the Wagner Act was passed the next year), and even the original act of 1926 had been supported by the railroad unions, see Legislative History of the Railway Labor Act, as Amended 175 (Comm. Print 1974); Kaufman, Collective Bargaining in the Railroad Industry 66 (1954). Moreover, the Act was not amended by the Taft-Hartley Act, as the Wagner Act was. And while Congress has sometimes worried about the honesty of unions, it has never worried about their competence to carry out the tasks that are in their self-interest to carry out.

A practical consideration in favor of a narrow standard of liability is suggested by the text of the appeal drafted by Evans. Most of the union officers who process grievances and commit the gaffes that propel the Grafs of this world into court are not professional advocates. They are hourly workers "grieving" on a part-time basis. It would not be realistic to try to hold them to

the same standard as lawyers, who are liable in damages if they fail to file their clients' appeals on time, and yet Graf wants us to judge Evans' inaction by what amounts to a concept of professional malpractice. True, the standard of care in negligence cases (the "reasonable man" standard) is sometimes scaled down to reflect a realistic assessment of the defendant's capabilities: if a ten year old is sued in tort, the standard of care applied is that of the average ten year old, not of the average person. See Prosser, *supra*, at 155. We could lower the standard of care applied in legal malpractice cases until it was a realistic standard to which to hold union grievers; but being remote from conditions on the shop floor, we would find it hard to set the right standard.

The representative character of the union and its officers must also be considered. Like any elected representative Local Chairman Evans must render an adequate level of "constituent service" to retain his position in the union; and the union must use competent grievers to retain its position as the workers' collective bargaining representative. Both officer and union thus have incentives to exercise care that are independent of the incentives that liability for negligence would provide. This is especially so in the railroad industry. A railroad worker is not required to use a union "griever" to prosecute his grievance. He can prosecute it on his own. See 45 U.S.C. § 153 First (i); *Essary* v. *Chicago & N.W. Transport. Co.*, 618 F.2d 13, 17 n. 6 (7th Cir. 1980). If distrust of union grievers leads many railroad workers to do their own grieving, they will wonder whether they are getting good value for their union dues. It is not in the union's interest for its agent to lose, in either a literal or a figurative sense, a worker's appeal unless the worker and the union are on the outs, and in that case the union would be liable under the *Hoffman* standard.

That standard serves also to protect a long-standing objective of federal labor law by minimizing judicial intervention in labor disputes normally resolved by arbitration. Cf. *United*

Steelworkers of America v. *American Mfg. Co.*, 363 U.S. 564, 568-69 (1960). Section 301 of the Taft-Hartley Act may have introduced a discordant note by making collective bargaining agreements judicially enforceable, but that statute does not apply here, and maybe one of the reasons Congress did not put the railroad industry under section 301 was that the Railway Labor Act unlike the National Labor Relations Act creates an elaborate scheme of arbitral remedies for violations of collective bargaining agreements. This scheme makes judicial interpretation of collective bargaining agreements even more otiose than in other industries. If the federal courts are to decide whether unions are competently representing workers with grievances—if they are to create and enforce a standard of care, and a reciprocal concept of malpractice, governing the union's relationship with the workers—they will be deeply involved in the railroad industry's labor relations.

The extent of judicial involvement would be disturbing even if a court never had to interpret a collective bargaining agreement in a suit against a union for violating the duty of fair representation (but it would, as we have seen), and even if the worker was not allowed to bring in the company as an additional defendant. Contrary to what the district court believed, the worker's remedies against the union and against the railroad are logically separable. The court's error, though, was a natural one. Most duty of fair representation cases come out of industries where collective bargaining contracts give unions the exclusive authority to prosecute grievances. In such industries the worker may not complain about a violation of the contract unless he shows that the union has violated its duty of fair representation. But as railroad worker is entitled to prosecute his grievances on his own.

This fact may seem to indicate that allowing the worker a broad right of action against the union for violation of the statutory duty of fair representation need not entangle the court in litigation over the company's duty to the worker under the

collective bargaining agreement. But the appearance is deceptive. The court as we have noted will have to interpret the agreement in the remedy phase of the suit against the union. Moreover, if the worker succeeds in proving that the union breached its duty to him, the court may not be able to provide an adequate remedy unless it allows him to litigate against the company as well. The problem is not just that the local union, if small, as many local unions are, may not be able to pay a damages judgment. Often the worker will, like Graf, be seeking reinstatement, which only the company can give him. Graf can try to haul the company before an arbitral board but he will get no satisfaction unless the board forgives noncompliance with the time limits in the agreement, which is unlikely. See Lazar, Due Process in Disciplinary Hearings: Decisions of the National Railroad Adjustment Board 353-65 (1980). A court reviewing a denial of an award on this ground is unlikely to compel such forgiveness either, owing to the extremely narrow scope of judicial review of the actions of those bodies. See *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 93-94 (1978); *Essary* v. *Chicato & N.W. Transport Co., supra;* but see *Stanton* v. *Delta Air lines, Inc.*, 669 F.2d 833 (1st Cir. 1982).

If for these reasons, which some courts have found persuasive, see, e.g., *Shum* v. *South Buffalo Ry.*, 496 F.2d 328, 331-32 (2d Cir. 1974), the worker is allowed to litigate against the company, he must prove a violation of the collective bargaining contract to prevail, which means that the court will have to interpret the contract to determine liability as well as damages. Other courts, however, require the worker to channel his complaint against the company through the remedial system set up by the Railway Labor Act, even though he is properly in court against the union, unless there is collusion between the union and the company. See, e.g., *Raus* v. *Brotherhood of Railway Carmen*, 663 F.2d 791, 798 (8th Cir. 1981). (Collusion sould make the remedies under the Railway Labor Act futile. The arbitral boards are composed of a company representative, a union representative, and a neutral—who cannot outvote the

other two if they are colluding.) The choice between confining the worker to arbitral remedies that may be worth nothing to him because the union failed to prosecute his grievance in timely fashion and allowing him to prosecute his grievance in court upon proving that the union breached its duty of fair representation is not a happy one. (Our circuit has not taken sides yet. In *Essary*, which dismissed a suit against an employer, the union was not a party to the appeal, and we did not have occasion to decide whether it had breached its duty of fair representation. See 618 F.2d at 14, 17 n. 6.) *Raus* leaves the worker without any remedy against the company, because of a procedural default for which he is blameless; he has a remedy against the union but it may not be adequate. *Shum* destroys the employer's reasonable reliance on the deadlines that the collective bargaining agreement imposes on the prosecution of grievances, and requires the court to interpret the agreement—but the court will have to do that anyway in the remedy stage of the suit against the union, if the suit reaches that stage.

We need not choose between these approaches since Graf failed to prove a breach of the union's duty. But it is relevant to observe that the approach of *Shum*, which allows the worker to prosecute his grievance in federal court when the union has violated its duty of fair representation, has at least some apparent merit and some judicial support and, unless totally rejected, points toward using a narrow standard to determine the union's liability—a *Hoffman* standard. (The approach of *Raus* is consistent with either a broad or a narrow standard.) *Hoffman* minimizes the occasions on which a federal district court has to take over the function of the arbitral boards and enforce a collective bargaining agreement. The court will do so only when the worker can prove intentional misconduct by the union in failing to prosecute his grievance.

We have given reasons for a narrow standard of liability but we cannot prove that the standard should be that of *Hoffman*. The sense that it should be narrow is pretty much universal. No

court thinks simple negligence would be a proper standard. The courts that reject *Hoffman*, that use a standard midway between simple negligence and intentional misconduct, have adopted in effect gross negligence. But as noted earlier that standard is criticized as too vague. This consideration tips the balance in favor of *Hoffman*. Count II was correctly dismissed.

The district judge dismissed Count I on his own initiative because he thought it had to fall when Count II fell. This was not quite correct. What is true is that unless the union has breached its duty of fair representation, a worker may not sue in court for breach of a collective bargaining contract; the Railway Labor Act confines him to arbitration and to the narrow judicial review of arbitration which the Act provides. *Order of Railway Conductors of America* v. *Pitney*, 326 U.S. 561, 565-66 (1946); *Slocum* v. *Delaware, Lackawanna & W. R.R.*, 339 U.S. 239, 244 (1950). Therefore, if the claim against the union is dismissed, as it properly was here, the claim against the company must be dismissed too. The company moved to dismiss on this ground and after the union's claim was dismissed the motion should have been granted—but only insofar as Count I alleges a violation of the collective bargaining agreement. Conceivably it also alleges a tort under federal or state law; indeed, that is how Count I actually reads. In the unlikely event that it is found to state a claim under federal law the district court should retain jurisdiction. But if it is found to state only a state tort claim it should be remanded to the state court where this suit began. We need not consider whether a claim of wrongful discharge under state tort law is preempted by the Railway Labor Act.

The judgment dismissing Count II of the complaint is affirmed. The judgment dismissing Count I in its entirety is vacated and the case is remanded for further proceedings consistent with this opinion. No costs in this court.

SO ORDERED.

WOOD, *Circuit Judge*, concurring in part and dissenting in part.

My disagreements with Judge Posner's majority opinion are not serious.

Since the jurisdictional issue considered by Judge Posner was not raised, briefed or argued by the parties in the district court or in this court I hesitate to embrace his discussion of that issue although it may well be a correct analysis. If I saw a serious question about our jurisdiction apparently overlooked by the parties, as I do not in this case, I would prefer to give the parties some additional opportunity to be heard on the issue before resolving it in a precedential opinion.

Judge Posner also reads Count I as possibly alleging a tort under federal or state law, and therefore vacates its dismissal and remands. Plaintiff, however, had not made that suggestion. In his complaint he alleged that he "was prevented from exhausting his administrative remedies as against" the railroad because of the Union's failure to timely appeal his dismissal. Plaintiff's own approach has been to tie the fate of Count I to Count II. Since it appears to me that the plaintiff narrowly viewed his own complaint, as did the other parties and Judge Grady, I would not endeavor to recharacterize it for him as sounding in tort at this stage. I would affirm the dismissal of Count I alternatively under *Andrews* v. *Louisville and Nashville R. Co.*, 406 U.S. 320 (1972) which I believe compels parties to discharge cases arising under the Railway Labor Act, 45 U.S.C. § 153, by arbitrating their disputes before the Adjustment Board. That was not done.

Therefore I would affirm on all issues, respectfully dissenting from the partial disposition of Count I.

A True Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX G

Exhibit J-4

TRANSPORTATION-COMMUNICATION
EMPLOYEES UNION

3860 Lindell Boulevard
St. Louis, MO. 63108

January 26, 1966

BU 11008-34

Mr. M. J. Hayes
General Chairman, Div. 34
1 Burton Place
Edwardsville, Illinois 62025

Dear Sir and Brother:

This is in reference to your claim for payment of lost time and reinstatement of Brother P. W. Peterson.

The file discloses that the Carrier offered to restore Brother Peterson to service on his regular assignment under certain conditions. You and Brother Peterson objected to the condition that, if in the future Brother Peterson failed to perform his work properly, he would be automatically disqualified. Carrier agreed to withdraw this condition from their offer, leaving only the condition that Brother Peterson cooperate with the Carrier. Brother Peterson rejected the offer and consequently became an extra employee. He advised the Carrier that he was sick and could not work. However, in the hearing Brother Peterson said he was not physically or mentally sick and was not under a doctor's care. He ignored Carrier's request that he submit evidence from his doctor that he was unable to work.

In recent Third Division Award No. 13467, the Referee in denying a similar claim said:

"This claim lacks merit. Griffiths properly sought to be released from his commitment to cover the October 17 position, but was denied in his request. What does appear to be improper is his rapid change of reason for seeking to lay off. It is possible that his personal health so deteriorated in the intervening three and one-half hours that he was legitimately unable to work the following day for physical reasons. But the evidence is so strongly convincing that Griffiths was fabricating a reason for excused absence as to support the Carrier's contention of malingering.

This conclusion is amply supported by Griffith's testimony. He sent the first message himself yet acknowledged that he told his wife what to put on the second message and had her sign it. Furthermore, "though he claimed a sudden worsening of his condition with headaches and vomiting, he was apparently well enough to go out with his wife to send the afternoon message. Although the Carrier did not initiate a medical examination of Griffiths, in view of his own past record, the specific and emphatic denial by Counts of his request for layoff on financial grounds, and the alleged rapid deterioration of his health in the early afternoon, Griffiths would have been prudent to forestall the almost certain challenge of his position by obtaining medical support for his claim of illness. This he did not do."

Brother Peterson was asked in the hearing if he was now ready to return to work as a Telegrapher and work any job his seniority entitled him to work, with the exception of first trick at Wansford. Brother Peterson replied: "I am not." He also said in the hearing: "I will never work anything on the C&EI but first trick."

For reasons known only by Brother Peterson, he has refused to return to work on his regular assignment and has also refused to assume his obligations as an extra employee.

After thoroughly analyzing all the correspondence and evidence contained in the file, I have reached the decision that we could not successfully prosecute this claim with the Adjustment Board.

I suggest you send Brother Peterson a copy of Addendum A and advise him that he may handle the case to the Adjustment Board personally if he so desires. The time limit for submitting this claim to the Adjustment Board expires May 8, 1966.

I am returning your file under sepatate cover.

Fraternally yours,

G. E. Leighty

APPENDIX H

Exhibit J-39

TRANSPORTATION COMMUNICATION
EMPLOYEES UNION

System Division No. 34

Edwardsville, Ill.
August 7, 1965

Mr. H. S. Vierling
General Mgr.
C&EI RR Co.
Chicago Hts., Ill.

Dear Sir:

This is an appeal to your office for your consideration and approval of the following claim, declined by J. T. Warren:

> "Claim of the General Committee that the Carrier violated and continues to violate the agreement, when on April 15, 1965, it severely and arbitrarily disciplined P. W. Peterson by removing him from the service of the Carrier
>
> The Carrier shall now reinstate P. W. Peterson to his former status with seniority, vacation and all other rights intact, and accordingly reimburse him for all wages lost from the date he is again able to work (8 hours each day), beginning on April 15, 1965."

Peterson was notified on April 15, 1965, that he was dismissed form service account of his failure to report for work as instructed. Peterson maintained that he was unable to work account of illness, and so notified the Management. His seniority dated from 11-24-45.

It is the position of the Employe that Peterson's dismissal for the charges "failure to report for work", is not only

unreasonable and harsh, but all out of proportion even if he had no legitimate reasons for not working. We maintain that he himself can determine his fitness for work, and the fact that during his twenty years of service he was never disciplined for the same cause, is evidence of his willingness to work when he is well.

We ask that you give prompt consideration to the reinstatement of Peterson with all rights restored, and to the payment of any compensation due.

Yours truly,

M. Hayes, General Chairman

cc: J.T. Warren

APPENDIX I

TRANSPORTATION COMMUNICATION
EMPLOYEES UNION
SYSTEM DIVISION NO. 34

Edwardsville, Ill.
August 18, 1965

Mr. D. E. Lyons
Asst. Director Personnel,
C&EI Railroad Co.
Chicago Hts, Ill.

Dear Sir:

This is in reply to your letter of August 16, 1965, concerning our claim for P. W. Peterson, submitted to your office on June 17, 1965.

I cannot accept your letter as being timely nor in order. It is noted that you failed to mention to whom the appeal should have been made, and I am not aware that there is any Official with the title of Asst. to the General Manager, since the office was vacated by Mr. Spicer. If so, I was not notified.

However, be that as it may, we maintain that this is a bonafide claim progressed for submission to the Adjustment Board; it is not an appeal for leniency as contemplated by the notice of September 5, 1965, which is in line with the appeal provisions of the agreement.

Furthermore, you previously accepted a similar claim for the same party without any question or objections as to jurisdiction.

For these reasons, it is our position that the Carrier is in violation of the Time Limit Rules, inasmuch as it failed to decline this claim within the required 60 days, and ask that you consider handling same for payment.

Yours truly,

M. J. Hayes, General Chairman

APPENDIX J

Exhibit J-42

TRANSPORTATION COMMUNICATION
EMPLOYES UNION

Edwardsville, Ill.
October 26, 1965

Mr. H.S. Vierling,
General Manager
C&EI Railroad Co.
Chicago Heights, Ill.

Dear Sir:

This is in reference to your letter of August 10, 1965, declining our appeal for the reinstatement of P.W. Peterson, who was dismissed on April 15, 1965, and discussed in conference with Mr. Lyons on September 27, 1965.

Peterson contended that he was unable to work account of illness, and he is the only one that can make that determination. Our position that the discipline was harsh and much too severe, has not changed.

Therefore, this is to advise that we cannot accept your declination of this claim, and are forwarding it to the office of the President of our Organization for further handling.

Yours truly,

M. J. Hayes, General Chairman

APPENDIX K

Statutes Involved

The statutes and constitutional provisions involved are as follows:

Rule 56, Fed.R.Civ.Proc., Title 28 U.S.C.A.:

(a) For claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party

A party against whom a clim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answeres to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make other order as is just.

(g) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Title 28, U.S.C.A., Sec. 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;..."

Title 28, U.S.C.A., Sec. 1331(a):

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

Title 28, U.S.C.A., Sec. 1337:

"The district courts shall have original jurisdiciton of any civil action or proceeding arising under any Act of

Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Title 45, U.S.C.A. Sec. 153 First (i), (m) and (q):

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the

Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

Rule 17(1)(a), Supreme Court Rules, Title 28 U.S.C.A.:

".1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

"(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Constitution of the United States, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Amendment V

"No person shall be...deprived of life, liberty, or property, without due process of law;..."